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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Petitioner-Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY,

Defendant-Respondent

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

JAMES D. CARPENTER,
Counsel for Appellant.

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APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

The Judgment and Opinion Below and Statutory Provisions Sustaining Jurisdiction

This appeal, presented this 18th day of December, 1951, is from a final judgment of the Supreme Court of New Jersey, dated October 1, 1951. A copy of the opinion on which the said judgment was entered (8 N.J. Adv. Sheets 15) is annexed hereto as Appendix A. The judgmeat affirmed the assessment of franchise taxes against The Central Railroad Company of New Jersey for the years 1948, 1949 and 1950. This appeal questions the constitutionality of that portion of the New Jersey Railroad Tax

Law which provides the manner of assessing franchise taxes against a railroad system carrying on interstate operations, as that statutory provision has been applied by the Director of the Division of Taxation, and as it has been construed by the Supreme Court of New Jersey. The jurisdiction of the Supreme Court of the United States to review this case by way of direct appeal is conferred by Title 28, United States Code, § 1257(2), 62 *Stat.* 929 (1948). The following decisions sustain such jurisdiction: *Dahnke-Water Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949). (Denial of equal protection through the construction and application of a statute not discriminatory on its face is reviewable on appeal.) A petition for allowance of appeal was presented to the Chief Justice of the Supreme Court of New Jersey on December 14th, 1951, and was denied.

Questions Involved

I

A New Jersey statute imposed a franchise tax at the rate of 10% on the net railway operating income, earned in New Jersey, of all railroads operating in the State. The statute was construed and applied by the tax administrator and by the State Supreme Court so as to aggregate the operating income of appellant's subsidiary, which operates a railroad only in the State of Pennsylvania, with the operating deficit of appellant, which operates a railroad in New Jersey but not in Pennsylvania, and to tax, as if earned in New Jersey, more than two-thirds of such aggregate operating income by applying a track-mile allocation formula. The fact was, as demonstrated by the operating accounts maintained by appellant pursuant to Interstate Commerce Commission requirements and under Interstate Commerce Commission supervision, that appellant had no

operating income attributable to New Jersey. Does not the statute, as so construed and applied, deny to appellant due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and does it not impose a burden on, and discriminate against, the interstate commerce in which appellant is engaged, in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, by imposing a franchise tax which demonstrably has no relation to the value of the local privilege?

II

The above-mentioned New Jersey franchise tax statute was construed and applied by the State of New Jersey so as to assess franchise taxes against railroads other than appellant by excluding from the computation of their net railway operating income earned in New Jersey the operating deficits of their subsidiary operating companies which bear to them the same relationship that appellant's abovementioned subsidiary operating in Pennsylvania bears to it. Does not such a construction of the statute deny to appellant the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States?

New Jersey Statute Involved

Railroads operating in the State of New Jersey are taxed exclusively under the provisions of the Railroad Tax Law of 1948, N.J.S.A. 54:29A-1, et seq. (Supp.), P.L. 1948, Chapter 40, which amended and supplemented P.L. 1941, Chapter 291. That statute imposes certain taxes on tangible property, with which we are not concerned here. In addition, it imposes an annual excise tax upon all railroads operating within the state, for the privilege of exercising their respective franchises. Sections 2, 13 and 14, which are the pertinent ones, are set

forth verbatim in Appendix B annexed. The tax imposed is 10% of the net railway operating income earned by the railroad during the calendar year preceding the assessment. In the case of a railroad or a system operating in more than one state, the income taxable in New Jersey is to be determined by allocating to this state the same proportion of the system's net railway operating income as the total track mileage operated within the state bears to the total track mileage operated everywhere. This allocation formula is generally known and will hereinafter be referred to as the "all track miles formula".

Tax Assessments Complained Of

The franchise tax assessments complained of were for the years 1948, 1949 and 1950,[1] based respectively on net railway operating income for the years 1947, 1948 and 1949. The fact is that appellant had a deficit of net railway operating income for the year 1947 in the amount of $4,923,000.00. The State of New Jersey, however, by arbitrarily allocating to New Jersey a major portion of the net railway operating income of appellant's Pennsylvania subsidiary, assessed the tax as if appellant had had a net railway operating income of $2,132,000.00. Appellant had a deficit of net railway operating income for the year 1948 in the amount of $3,885,000.00. The State of New Jersey, however, by arbitrarily allocating to New Jersey a major portion of the net railway operating income of appellant's Pennsylvania subsidiary, assessed the tax as if

[1] The complaints and appeals for 1948 and 1949 were consolidated for trial. After the trial, the parties entered a stipulation with respect to the complaint and appeal from the assessments for the year 1950 to the effect that it involved the same law and facts as are involved in the appeals from the assessments for the years 1948 and 1949, except for the amount of money, and should, therefore, be governed and controlled by the ultimate decision both on the law and the facts in the appeals from the assessments for the years 1948 and 1949.

appellant had had a net railway operating income of $4,354,000.00. Appellant had a deficit of net railway operating income for the year 1949 in the amount of $4,667,000.00. The State of New Jersey, however, by arbitrarily allocating to New Jersey a major portion of the net railway operating income of appellant's Pennsylvania subsidiary, assessed the tax as if appellant had had a net railway operating income of $2,545,000.00. For each of these years, and for the year 1950, the tax should have been the statutory minimum of $4,000.00. The taxes actually assessed were: for 1948, $213,000.00; for 1949, $435,000.00, and for 1950, $254,000.00, a total of $902,000.00.

Nature of the Case

The Central Railroad of New Jersey is a Class I interstate railroad. Prior to 1946, it operated its present properties, which are located within the States of New Jersey and New York, and also operated certain properties located in the State of Pennsylvania. The Pennsylvania property was known as the Lehigh and Susquehanna Division of the Central Railroad, and was held under a lease from the Lehigh Coal and Navigation Company. While appellant's properties were being operated by trustees in reorganization, under the supervision of the United States District Court for New Jersey, it was determined by the trustees that it would be advantageous to vest the Pennsylvania properties in a wholly owned subsidiary, and for that subsidiary to operate the Pennsylvania lines rather than to have them operated by appellant (132a-26 to 134a-28; 136a-1).[2] This plan for segregation and separate operation of the Pennsylvania

[2] All references are to the Appendix and Supplemental Appendix of the appellant, which were before the Supreme Court of New Jersey, and which are certified herewith by the Clerk of that Court.

lines was approved by the United States District Court (Ex. CR-6, 213a) and by the Interstate Commerce Commission (Ex. CR-8, 232a). The plan contemplated that, although affiliated, the new corporation should maintain a separate organization and should have the same relationship to appellant, as regards transportation service, as would any other independent connecting road (157a-4 to 25; 165a-30 to 166a-19).

The separation actually occurred on August 5, 1946. The appellant had for many years owned all the stock of a small railroad corporation in Pennsylvania, by name, Easton & Western Railroad. The name of this Railroad was changed to Central Railroad Company of Pennsylvania (Ex. CR-8, 231a-22).[3] The trustees subleased to CRP all of the properties in Pennsylvania which had been leased from the Lehigh Coal and Navigation Co., and the trustees purchased a block of stock from CRP for cash, in order to give CRP working capital (Ex. CR-5, 192a). They also sold or leased to CRP sufficient locomotives, rolling stock and other property to set it up as a fully integrated and completely equipped independent railroad (Ex. CR-20, 335a; 156a-12 to 30). CNJ and CRP had the same chief executive officers, but from division superintendents down, each railroad is separate and distinct from the other (156a-30 to 40). CRP has its own employees and operates its own lines of railroad, which are wholly within the State of Pennsylvania (Map from Ex. CR-33, 353a).

CRP, from and after August 5, 1946, the date of separation, has maintained its own separate books of account (80a-3 to 19); it has its own timetables, and annually has

[3] For convenience, hereinafter the appellant, Central Railroad Company of New Jersey, will be referred to as CNJ, and its subsidiary, Central Railroad Company of Pennsylvania, will be referred to as CRP.

filed its Form A Reports with the Interstate Commerce Commission, as required of every Class I railroad (Ex. CR-13 and 14, 287a to 311a). CNJ also files its own Form A Reports, as required of it as a Class I railroad (Ex. CR-10 and 11, 263a to 286a).

The accounting forms used by the two railroads are separate and distinct from each other (92a-35 to 100a-33), and, stating it briefly, the two railroads operate as separately and distinctly as any two other Class I railroads whose lines happen to connect.

In accordance with the prevailing practice of other separately operated railroads which engage in through train operations, all train operations, both freight and passenger, on the CRP are under the control of CRP, and CNJ has no jurisdiction whatsoever over either the crews in local service of the CRP, or through joint service, so long as the crews are on the tracks of the CRP (164a-28 to 35). Whenever a joint through train operating on the CRP, and pulled by a CRP locomotive, and operated by a CRP crew, passes the state line junction on the Delaware River, the crew comes under the jurisdiction of the CNJ (164a-36), and vice versa. The road on which the foreign crew is operating reimburses the foreign road for the crew's wages and for the use of the foreign locomotive (88a-20 to 35; 111a-30 to 112a-20). At the time of the hearing, the CRP had 1,780 employees on its payroll, most of whom perform all of their services exclusively on the property of the CRP and at no time do any work on the CNJ, the only exception being those few crews who operate trains in joint service on the two roads (163a-30 to 40). Out of a daily average of approximately 78 train crews employed by CRP, only about 13 operate through and over the tracks of the CNJ in joint through service (162a-33 to 163a-18).

In the case of joint through freight shipments, the two lines share the revenue in accordance with division of revenue schedules, which were published at the time of separation (Ex. CR-20, 348a). These divisions were based upon existing divisions between CNJ and carriers other than CRP with which it connects at Philipsburg, New Jersey; and upon a careful study of divisions in effect between other and independent carriers which roughly parallel the lines of CNJ and CRP (136a-15 to 138a-25). The ICC found specifically that the divisions were prima facia fair and in accordance with general practices in the territory (Ex. CR-8, 255a-10 to 30). The divisions had to be fair and adequate, in order to secure the consent of the Lehigh Coal and Navigation Co. to the sublease. Had the Lehigh Coal and Navigation been required to take back the Pennsylvania properties because of the disaffirmance of, or default upon, the lease by the reorganization trustees of CNJ, divisions unduly generous to CRP would have hurt the lessor, since connecting lines would prefer to route through shipments over competing carriers receiving a smaller proportion of joint through revenue (139a-13 to 140a-10).

The operating accounts that are maintained separately by these two railroads are maintained in the greatest of detail, as required by the ICC. Each railroad is required to complete a schedule designated "300.1, Income Account for the Year" (264a, 276a, 288a and 301a), in which it is required to set forth the balances taken from fifteen separate major operating accounts, including Account No. 501, "Railway Operating Revenues", and Account No. 531, "Railway Operating Expenses".

Account No. 501 "Railway Operating Revenues", is, in turn, based upon a schedule in the Form A Report designated "310. Railway Operating Revenues", and this Schedule 310 requires the railroad to set forth the balances from

twenty-eight separate underlying operating revenue accounts.

Account No. 531, "Railway Operating Expenses", is, in turn, based upon a schedule in the Form A Report designated "320. Railway Operating Expenses", and this schedule requires the railroad to set forth the balances from 142 separate underlying operating expense accounts.

These underlying operating revenue accounts and operating expense accounts are necessarily based upon literally hundreds of thousands of separate operating transactions which each railroad records in its own operating books and records. Unless each of the two roads in question had maintained detailed acounts, recording the results of their respective operations, it would have been impossible for them to have filed their respective Form A Reports.

Appellant has shown in great detail the nature of the separate operation of the two railroads, and the nature and accuracy of their separate operating accounts, because appellant's case rests ultimately upon the proposition that the franchise tax payable to the State of New Jersey by CNJ should have been based upon that railroad's net railway operating income as determined from its own operating accounts. It is appellant's contention, in view of the precise determination of net railway operating income earned in the State of New Jersey resulting from the maintenance of these accounts, that the statute, as construed and applied by the assessing officials and by the courts of New Jersey, requiring the franchise tax base to be determined by aggregating the reported net railway operating incomes of CNJ and CRP and then allocating a fraction (67%) to New Jersey on the all-track-mileage formula constitutes a violation of the Constitution of the United States.

Appellant contends that the use of a track-mileage formula rather than the operating accounts maintained by the taxpayer for the purpose of determining the income of

CNJ subject to the franchise tax is a violation of the Commerce Clause and of the Due Process Clause, and that the Supreme Court of New Jersey has indulged a statutory construction which denies to appellant the equal protection of the law.

The Railroad Tax Law of the State of New Jersey contains a very precise definition of what is a railroad system. That definition is contained in N.J.S.A. 54:29A-2, P.L. 1948, Chapter 40, §2, and reads as follows:

> " 'System' means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract, and for which separate operating accounts are not maintained."

It was appellant's contention below that the maintenance by it and its subsidiary of separate operating accounts exempted the two roads from being treated as a single system, and that, therefore, the only possible basis for taxation of CNJ was its own operating accounts. The Supreme Court of New Jersey, however, held that the statute did not mean to exclude railroads from system treatment merely on the basis of the maintenance of separate operating accounts, but instead, required that all roads which, in fact, were affiliated, and in fact provided an integrated transportation service to the public, were to be treated as a system and were to be taxed under the allocation formula rather than on the basis of their separate operating accounts, which accurately show the income earned in New Jersey and properly subject to taxation by New Jersey.

This construction of the State statute is, of course, not

reviewable here upon its merits. The ruling of the Court, however, was made after the appellant had called to the Court's attention the fact that other groups of railroads, whose operating relationships were identical to the operating relationships subsisting between the CNJ and the CRP, were not taxed as systems, but instead were taxed on the basis of the separate operating accounts of the component roads; and that the apparent inconsistency in the tax treatment of the CNJ-CRP group and other similarly situated railroad groups was explicable only upon the basis that the statute was being construed by the taxing authorities with no other purpose or guide than the maximization of revenue. In other words, appellant claimed before the Supreme Court of New Jersey that the construction of the statute which the Supreme Court ultimately adopted in this case had the effect of discriminating against the appellant. This claim is an additional reason for a thorough analysis of the operating relationships between CNJ and CRP, so that the Court may compare this situation with the situation of other railroads which were exempted from taxation on a system basis. The facts concerning these other carriers are fully stated *infra*, in connection with the proof that the questions presented are substantial.

Manner in Which Federal Questions Were Raised

The constitutional questions were first raised at the earliest possible time—namely, in the appeals from the action of the assessing officials to the quasi-judicial Division of Tax Appeals. All three Complaints and Appeals here involved were substantially identical, and we quote from only one of them, that taken from the assessment for 1948:

> "5. Chapter 291, P. L. 1941, as amended and supplemented, as applied and construed by the Acting Director, Division of Taxation, in the assessment herein

complained of violates the Constitution of the United States for the following reasons:

"(a) It imposes upon your appellant a New Jersey franchise tax measured not by the net railway operating income of your appellant but by net railway operating income which is in fact net railway operating income derived from the operation of a railroad wholly without the State of New Jersey and which is engaged in the transportation of persons and property in interstate commerce. Such tax constitutes an undue burden and discriminates against the interstate commerce in which appellant is engaged, all in violation of Art. 1, Section 8, Clause 3 of the Constitution of the United States.

"(b) It imposes upon your appellant a New Jersey franchise tax measured not by the net railway operating income of your appellant but by net railway operating income which is in fact net railway operating income derived from the operation of a railroad wholly without the State of New Jersey, and whose operations are conducted by Central Railroad Company of Pennsylvania, a corporation organized under the laws of the State of Pennsylvania. Such tax, imposed upon earnings and operations which are beyond the jurisdiction of the State of New Jersey, deprives your appellant of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"(c) It imposes upon your appellant a New Jersey franchise tax which unjustly and unreasonably discriminates against your appellant compared with other railroad companies operating in the State of New Jersey. Such tax denies your appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States." (4a-10 to 5a-20)

The Division of Tax Appeals decided the case adversely to appellant and a further appeal was taken to the Appellate Division of the Superior Court of New Jersey. Under New

Jersey practice, the entire record went up, and, of course, the constitutional points were before the Court. Before the case was heard in the Appellate Division, the Supreme Court of New Jersey, under its discretionary jurisdiction, certified the case for hearing and determination before itself. Under New Jersey practice, the record as it stood in the Appellate Division became the record in the Supreme Court. Therefore, the federal questions were duly presented to the Supreme Court. That this case was presented to, and decided by, the Supreme Court of New Jersey as one where the validity of a state statute was drawn into question on the ground of its being repugnant to the Constitution of the United States may be seen from the following quotation from the opinion below:

> "The appellant says the statute as construed and applied by the Division of Tax Appeals violates the commerce clause and the equal protection and due process clauses of the 14th Amendment of the Federal Constitution. * * *"

The Federal Questions Are Substantial

The ultimate federal questions presented are three-fold. The first is whether or not the construction placed upon the statute denied to appellant due process of law, in that the State of New Jersey assessed taxes against appellant by allocating to itself net railway operating income which was not derived from the exercise of any franchise enjoyed under the State of New Jersey, but, on the contrary, demonstrably arose solely from the operations of appellant's subsidiary, CRP, wholly within the State of Pennsylvania. The second question is whether or not the construction placed upon the statute imposes a burden on interstate commerce in that the uncontradicted evidence clearly shows that all New Jersey operations are carried out at a tremendous loss, and that the profit enjoyed by the CNJ sys-

tem arises exclusively from interstate transportation which is beyond the power of the State of New Jersey to regulate. The first and second questions are based upon the fact that the analytical ICC accounts of CNJ and CRP present an accurate statement of costs and revenues fairly allocable to the political sub-divisions involved, and that the application of the all-track-mile formula in disregard of these accurate records is arbitrary. The third is whether, in so construing the statute as to treat CNJ and CRP as a single system for tax purposes, the taxing authorities and the Division of Tax Appeals have not established irrational and arbitrary classifications. Evidence was introduced which proved that other groups of carriers having the same intercorporate and transportation relationships as CNJ does with CRP were not treated as systems, and that this difference in tax treatment was apparently based on the fact that if they had been treated as systems the amount of the New Jersey Franchise Excise Tax assessable against them would have been diminished. In the case at bar, of course, the amount of franchise tax assessable was increased by treating CNJ and CRP as a system.

A. Due Process of Law

The separate operating accounts which are maintained by CNJ and CRP, under the supervision and according to the requirements of the Interstate Commerce Commission, are accurate revenue and costs records which reflect the respective results of operations within New Jersey and Pennsylvania.

Your appellant recognizes that the State of New Jersey has the right to reach not only the intrastate income of a railroad, but also such portion of the interstate income as may reasonably be attributed to activities carried on or facilities maintained within the State. The separate operating accounts filed with the Interstate Commerce Commis-

sion by the two railroads, however, give full measure of weight to the income-producing capacity of the Jersey properties and activities, and account therefor more accurately than any formula possibly could.

This can be very simply shown by an analysis of first the gross revenue figures, and then the figures for operating expenses. Taking, for example, the year ended December 31, 1947, it appears that CNJ had gross operating revenues of roughly $37,500,000.00 (Exhibit CR-10, 264a). In the same year, CRP had gross railway operating revenues of approximately $18,200,000.00 (Exhibit CR-13, 288a), for a combined total of $55,700,000.00. Thus, the railroads' own accounts, *including the results of their division of joint through revenues*, attribute 67% of the gross income to the State of New Jersey. This is exactly the allocation percentage which the State seeks to apply under the all-track mileage formula (8a-30 to 35).

We turn then to the question of operating expenses. For the CNJ, these total, during the year 1947, approximately $34,165,000.00 (Ex. CR-10, 264a). Of that amount, approximately $13,150,000.00 is chargeable to passenger operations (Ex. CR-10, 273a and 274a), which are conducted at a terrific loss ($9,223,000.00 in 1948, and $8,717,000.00 in 1949 (146a-11, 147a-23)). The overwhelming bulk of the CNJ's passenger business is purely commuter traffic intrastate (145a-35 to 146a-10). Therefore, there can be no claim made by the State of New Jersey that the operating accounts attribute to New Jersey expenses of passenger operation which are properly chargeable to Pennsylvania.

It should further be noted that one of the charges allowable against railway operating income, in determining the *net* railway operating income for franchise tax purposes, is the item of taxation. CNJ pays, in common with other railroads in New Jersey, a very heavy tax upon its tangible property. The tax accruals of CNJ during 1947, which

affected the tax base for the year 1948, were $4,864,000.00 (264a-6)—more than enough to wipe out the operating profit of $3,399,000.00, which CNJ enjoyed prior to tax accruals (264a-5). The same is true for the tax base year 1948, when the operating profit before tax accruals was $4,513,000.00 (276a-5), and the tax accruals were $4,705,000.00 (276a-6). This is the explanation of why CNJ shows an operating loss. The loss has nothing to do with "bookkeeping legerdemain", as charged below.

The Attorney General of New Jersey, however, contended that the division of joint through freight revenues between the CNJ and the CRP is unduly generous to CRP. The record, however, shows that the divisions are in line with the divisions generally obtaining between all the railroads in this territory, and that adherence to the prevailing practices was necessary in order to satisfy Lehigh Coal and Navigation, the lessor of the Pennsylvania properties, of their fairness (136a-15 to 138a-25; 139a-13 to 140a-10). The record further shows that application has been made to the ICC for permission to increase the proportion payable to CNJ, but that such efforts have been unsuccessful (165a-10 to 30).

That the operating accounts and divisions of revenue between CNJ and CRP are fair, honest and accurate, and are not rigged in favor of CRP, as charged by the State, but without support of any facts, is further clearly demonstrated by the fact that the operating ratio of CRP is just as high as the operating ratio of the Lehigh and New England 359a-4 to 360a-38; Ex. CR-39, 363a), a coal carrying road which is roughly parallel to and operates under substantially the same conditions as CRP (353a). If the divisions were rigged, CRP's operating ratio would obviously be much lower than that of the similarly situated Lehigh and New England.

It is respectfully submitted that this case should be ruled

by *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76 (1927), where this Court struck down as unconstitutional a franchise tax assessment made against Southern Railway by virtue of the activities carried on in Kentucky by a wholly owned but separately operated subsidiary. A tax was imposed upon the franchise value, which was determined by capitalizing the net railway operating income of the system, allocating the capitalized value to Kentucky on a mileage basis, and deducting from the allocated share the value of tangible property otherwise taxed within the Commonwealth. Several of Southern's subsidiaries within Kentucky were permitted to report separately for franchise tax purposes, and the controverted assessment was made only by reason of the activities, and the alleged apportioned franchise value, of the corporation named "Southern Railway in Kentucky". The lines of that subsidiary showed a record of per mile operating income much lower than that of the system as a whole, and, in fact, the subsidiary's lines ordinarily operated at a loss. However, computing the franchise value on a system basis gave a franchise value of from $13,000.00 to $23,000.00 per mile for the subsidiary. In striking down the tax, this Court said:

> "* * * If taken separately it is clear that, because of lack of net earnings no substantial intangible elements of value could reasonably be attributed to the railroad of that company. * * * The mere statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it cannot be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the state. And as the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount adjudged to have been omitted was arbitrarily excessive and included values of system property beyond the limits of Kentucky."

Similarly, this case should be ruled by *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123 (1931), and by the principle enunciated in *Norfolk and Western Railway Co.* v. *North Carolina*, 297 U. S. 682 (1936), that a track mileage formula cannot constitutionally be used in any case where there is demonstrably no relationship between mileage and income. This is such a case.

B. Commerce Clause

The Supreme Court of New Jersey has erred in holding that the franchise tax as levied upon the earnings of The Central Railroad Company of New Jersey is not an unreasonable burden upon interstate commerce. This Court has always looked beyond form and given due regard to substance. It has always held unconstitutional a tax which in operation and practical effect imposed a levy for the privilege of carrying on interstate commerce, notwithstanding the characterization which the state court may have chosen to apply to the tax. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135 (1918); *New Jersey Bell Telephone Co.* v. *Board of Taxes*, 280 U. S. 338 (1930); *cf. Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951).

The Form A Reports filed by CNJ with the Interstate Commerce Commission show that, upon any analytically sound basis, CNJ loses money. This being so, the tax base used by the Director of the Division of Taxation, is an attempt to measure the value of a local privilege by income derived wholly from interstate transportation, carried out by CNJ and CRP in cooperation, which has no relationship whatsoever to the value of the local franchise. As construed and applied below, the statute, in its practical effect, seeks to make the doing of a purely interstate and constitutionally protected transportation business in the State of Pennsylvania taxable by the State of New Jersey.

That the Railroad Franchise Tax Act, as construed and applied below, runs afoul of the Commerce Clause is also demonstrated by reference to another series of cases in this Court. It has always been the law that even a constitutionally permissible tax measured by the receipts from, or imposed on the instrumentalities of, interstate commerce must be held invalid when the measure of the tax is such as to subject commerce among the states to cumulative burdens which are not, and in the nature of the case cannot be, equally imposed upon purely local operations. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275 (1919); *Wallace* v. *Hines*, 253 U. S. 66 (1920); *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

As was said by Mr. Justice Stone in *Gwin, White & Prince:*

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may with equal right lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against the interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

This principle was recently reiterated in *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 (1948).

The formula as here applied results in attributing to New Jersey a far larger portion of the combined CNJ-CRP operating income than the activities and facilities within the state can reasonably justify. And, as in the *Adams*,

Gwin and *Greyhound* cases, the statutory construction adopted below is one which is capable of subjecting commerce among the states to a multiple burden.[4] While the attorneys for the state maintain the appropriateness of the New Jersey formula, they cannot deny that the State of Pennsylvania also has full constitutional power to impose a tax upon the entire net railway operating income of CRP. That entire income is fairly apportionable to that state, because it is actually earned there. If Pennsylvania were so to tax, the result would be a cumulative burden upon the proceeds of interstate commerce—a burden which would not be felt if CNJ were to interchange freight at state line junction with, for example, the Lehigh Valley instead of CRP. The effect of the decision below is to make interstate transportation by railroad subject to a multiple burden whenever, in the judgment of New Jersey's taxing authorities, the interchanging roads are so allied by stock control or operating contracts as to constitute a system. Whatever respondents may say concerning the reality of CNJ's control over CRP, they can never be allowed to predicate upon that control the imposition of multiple and discriminatory burdens upon receipts from interstate commerce.

C. Equal Protection of the Laws

The State's expert, Charles E. Barnes, who calculated the franchise tax on the various railroads doing business in the State from their Form A Reports, and made out the assessment, testified that, in assessing the franchise tax against the Pennsylvania Railroad Company, he did not include in its revenue the revenues of the Long Island Rail-

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[4] The statutory construction adopted below has the effect also of depriving the Federal Government of taxes, since all taxes improperly assessed by the State of New Jersey are deducted by the railroad in computing its net income subject to the federal income tax.

road (173a-38 to 174a-5). The principal general officers of the Pennsylvania Railroad and the Long Island Railroad were virtually identical in the years here involved (Ex. CR-41, 356a; Ex. CR-42, 357a). Mr. Barnes admitted that the stock of the Long Island was owned one hundred percent by The Pennsylvania Railroad Company (174a-5 to 10), and that the accounting of the Long Island was performed in Philadelphia, and many of the other functions were performed in Philadelphia, in the general offices of the Pennsylvania Railroad (176a-4 to 20). There was also evidence that the expenses of the joint officers and so forth are prorated as between the Pennsylvania Railroad and the Long Island, just as they were prorated between the CNJ and CRP (154a-30 to 40).

Mr. Barnes maintained, nonetheless, that the Long Island was operated separately from the Pennsylvania, and that since the Pennsylvania and Long Island each filed separate Form A Reports, he did not assess the earnings of the Long Island with the Pennsylvania.

It is interesting to note, however, that this Court has held that the Long Island and the Pennsylvania operate some properties jointly. The lines of the Long Island end at Sunnyside, and the Long Island reaches Penn Station by trackage rights over the Pennsylvania Railroad's East River Tunnels. In holding such trackage rights subject to regulation by the Interstate Commerce Commission, this Court found that the Long Island and the Pennsylvania jointly operated the tunnels and other terminal facilities. *Transit Commission* v. *United States*, 289 U. S. 121 (1933). Accordingly, there can be no difference between the situation that existed between the Pennsylvania Railroad and the Long Island Railroad Company for 1947 and 1948, and the situation between The Central Railroad Company of New Jersey and The Central Railroad Company of Penn-

sylvania. From an assessing standpoint, however, it was to the advantage of the State to include the earnings of The Central Railroad Company of Pennsylvania in the earnings of the CNJ, and to exclude the deficits of the Long Island from the net operating profit of the Pennsylvania. Exhibit CR-40, 355a, shows the operating revenues, operating expenses and net railway operating income for the Long Island Company for 1947 and 1948, from which it appears that the Long Island had a deficit in net railway operating income for 1947 of $2,193,000.00, and for 1948, a deficit of $4,233,000.00. If those deficits had been included or charged against the net railway operating income of the Pennsylvania, the State would then have received less in franchise taxes from the Pennsylvania Railroad.

Furthermore, Mr. Barnes was asked if he knew any other railroads in the State whose stock is owned by the parent and has common officers, which he did not assess as part of the system of the parent. He said:

> "Well, off-hand, I can think of none other than the Penn-Reading Seashore Lines where you have joint ownership of the major roads" (175a-13 to 16).

Mr. Barnes testified that the earnings of the Penn-Reading Seashore Lines were not assessed to either parent, either the Pennsylvania Railroad or the Reading Railroad Company (175a-17 to 20).

The Pennsylvania-Reading Seashore Lines is owned 66⅔% by the Pennsylvania Railroad Company. *Unification of Lines in Southern New Jersey*, 193 I. C. C. 183 (1933). In origin and operating relationships, the Pennsylvania and the Penn-Reading are startlingly similar to the CNJ and the CRP. Prior to 1933, Southern New Jersey was served by two railroads, one a subsidiary of the Reading, and the other a subsidiary of the Pennsylvania. In 1933, the two companies agreed upon a consolidation of the South

Jersey roads into the Penn-Reading Seashore Lines. Accordingly, the Reading transferred part of the stock of its subsidiary, Atlantic City Railroad Company, to the Pennsylvania, and the Pennsylvania caused the assignment of the 999-year lease on its subsidiary's property to Atlantic (364a-4 to 366a-40). Atlantic changed its name to "Pennsylvania-Reading Seashore Lines" after consummation of the merger, as contemplated by the agreement between the parent companies (377a-20 to 25).

Under the operating agreement, the following points of similarity to the CNJ-CRP setup appear: Although the Penn-Reading Seashore Lines are technically separately operated, nonetheless, the obligation on its leased property is jointly guaranteed by the Reading and by the Pennsylvania (366a-20 to 40). The directors of the subsidiary are the nominees of its parents (367a-30 to 35), and each parent is given sole control in appointing the operating heads of certain of the departments of the subsidiary (368a-13 to 18). Traffic matters are to be handled by the traffic officers of the parents (368a-19 to 21), and no large purchases of materials or supplies may be effected without their consent (368a-25 to 30). No existing route or channel of trade may be discontinued without their consent (368a-35 to 369a-6). There are provisions for the joint use of freight and passenger terminals and the apportionment of costs (370a-20 to 371a-20), and for the maintenance of joint through service (371a-25 to 372a-12). Finally, there are the very important factors that the divisions of joint through rates with outside roads are to be fixed by agreement between the parents (372a-25 to 35), and that the equipment used by the subsidiary is to be leased from the Pennsylvania Railroad (373a-18 to 27). All of these provisions are, in their substance, identical with the provisions subsisting in the lease and operating agreement between CNJ and CRP, and one

might reasonably suppose that the Penn-Reading Seashore Lines would be treated as a part of the Pennsylvania system, its principal parent, for franchise tax purposes. Nonetheless, Mr. Barnes testified that such is not the case, because Penn-Reading Seashore Lines filed its own Form A Report, just as CRP did.

The reason is quite evident. Penn-Reading Seashore Lines loses heavily on its operations. See *Penn-Reading Seashore Lines* v. *Public Utility Commission*, 5 N. J. 114, 74 A. 2d 265 (1950). Therefore, to include Penn-Reading in the Pennsylvania system would diminish the net railway operating income of the parent, and might, therefore, reduce the amount of franchise tax payable to New Jersey.

Another example of departure from a uniform application of the statute exists with respect to the system formed by the integrated operation of the Baltimore & Ohio, Reading and Central Railroad of New Jersey lines. The relationship between those three lines is very similar to the relationship between CNJ and CRP. The B. & O. does not own or operate any main line trackage beyond Philadelphia (Ex. CR-33). The main lines of the Reading within the State of New Jersey run only from the Delaware River at Trenton to Bound Brook Junction (Ex. CR-33). At that point, interchange is had with CNJ. Because the Reading owned a majority of the common stock of CNJ, and because B. & O. controlled Reading, CNJ has always been the preferred interchange carrier for Reading and B. & O. freight (Ex. CR-8, 234a-27 to 40). Through passenger service in B. & O. equipment is maintained from CNJ terminal in Jersey City via CNJ and Reading lines to Philadelphia, and thence via B. & O. to points south and west. The relationships between these three lines are a perfect example of companies whose properties are being operated as a single utility by virtue of stock control. Yet, these three lines have always been

treated as separate for franchise tax purposes, presumably because they maintain separate operating accounts and file separate Form A Reports with the Interstate Commerce Commission.

The foregoing data are extremely interesting when considered in the light of the professed intention of the taxing authorities and the Supreme Court of New Jersey to make *integrated transportation utilization* the criterion of whether affiliated roads shall be treated as a single system. The Long Island and the Pennsylvania make integrated utilization of their facilities for all freight hauling purposes. Similarly, Pennsylvania and the Penn-Reading Seashore are integrated under an operating agreement almost identical in its terms with the lease between CNJ and CRP. It is, therefore, evident that to construe the statute as requiring CNJ and CRP to be taxed as a system departs from uniform application of the professed criterion, and results in taxing appellant on an irrational and unequal basis.

As we have shown, it would clearly be to the State's disadvantage to include the Long Island and the Penn-Reading Seashore Lines in the system of the Pennsylvania Railroad. On the other hand, to tax CNJ and CRP as a single system means that the amount of tax payable to New Jersey will be increased. In other words, the amount of revenue to be derived rather than the fair import of the language has apparently controlled the judgment of the State officials in construing the statutory definition of a system for tax purposes. This necessarily results in unreasonable discrimination among identically situated carriers.

Such statutory interpretation violates the equal protection clause of the 14th Amendment. Equal protection means the right to taxation which is not only fair, but also based upon rational standards of classification. *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Hartford*

Steam Boiler Insurance Co. v. *Harrison*, 301 U. S. 459 (1937). What is more, a party has standing to raise the question of equal protection without being required to show that the tax statute is incorrectly applied to him, and without being required to show that the tax assessed against him is unduly burdensome or confiscatory, as it is in this case. *Iowa Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931); *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 561 (1935).

D. This Case Is Not Controlled by Any Earlier Decision Involving These Parties

The Supreme Court of New Jersey disposed of appellant's contentions in the following language:

> "The appellant says the statute as construed and applied by the Division of Tax Appeals violates the commerce clause and the equal protection and due process clauses of the 14th Amendment of the Federal Constitution. It made the same claim in its appeal from its 1946 franchise tax which we decided against the appellant in *Gardner, Trustee vs. Division of Tax Appeals*, 3 N. J. 27 (1949). An appeal was taken in that case to the United States Supreme Court, which was dismissed on the State's motion. *Central Railroad Company of New Jersey vs. Division of Tax Appeals*, 338 U. S. 946 (1950), 70 S. Ct. 488, 94 L. Ed. 583."

In so holding, the Supreme Court of New Jersey has fallen into error. In the 1949 case, appellant complained against the disallowance of certain items as a proper deduction from its net railway operating income. In the tax years there under consideration (1942-1946), the net railway operating incomes of both the New Jersey and Pennsylvania properties were consolidated for New Jersey franchise tax purposes, and this was quite correct, since during those years, no separate operating accounts were kept, nor was CPR even in existence at any time there

relevant. The taxes here involved were assessed after CPR had been set off from CNJ as a step in the reorganization of CNJ and with the approval of the bankruptcy court and the Interstate Commerce Commission as in the public interest. Appellant's principal claim in the 1949 case was that the New Jersey franchise tax was, in practical effect, a gross receipts tax, and that it was unconstitutional, even if fairly apportioned. This Court dismissed the appeal, presumably holding that *Central Greyhound Lines* v. *Mealey* had upheld the validity of an apportioned gross receipts tax upon transportation companies.

The issues in the present case are entirely different. Appellant here attacks the applicability of the apportionment formula in the face of accurately kept income and cost accounts which provide a sound basis for segregating the income of a unitary enterprise among the political subdivisions in which it operates, and also attacks the imposition of discriminatory taxation. In the earlier case, we complained against accounting techniques which were required by the Commissioner of Taxation prior to allocation. We did not attack the allocation itself. In the present case, the attack is on the State's very right to apply the allocation formula under circumstances in which it conclusively appears that New Jersey is actually assessing against CNJ 67% of every dollar earned by CRP in operation of an interstate railroad located wholly in Pennsylvania. The constitutional questions which are raised are entirely different.

Conclusion

For all of the foregoing reasons, petitioner-appellant respectfully suggests that the present case may be reviewed by this Court on direct appeal, and that the questions presented are substantial, meriting a plenary hearing.

JAMES D. CARPENTER,
Attorney for Petitioner-Appellant.

SCHEDULE A

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1951

No. A 2

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Petitioner-Appellant,*

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY, *Defendant-Respondent*

Argued September 10, 1951; decided October 1, 1951.

On appeal from the Division of Tax Appeals, Department of the Treasury of the State of New Jersey.

Mr. James D. Carpenter argued the cause for the appellant; Carpenter, Gilmore & Dwyer, attorneys; Mr. Judson C. McLester of the New York Bar and Mr. Milton A. Dauber on the brief.

Mr. Benjamin C. VanTine, Deputy Attorney-General, argued the cause for the respondent; Mr. Theodore D. Parsons, Attorney-General, attorney.

The opinion of the Court was delivered by

OLIPHANT, *J.:*

This is a railroad tax case which involves essentially the construction of R. S. 54:29A-2.

The appeals, which were taken to the Superior Court, Appellate Division, and certified here on our own motion, are from judgments of the Division of Tax Appeals, Department of the Treasury, which affirmed the franchise tax assessments against the Central Railroad of New Jersey made by the Director of the Division of Taxation for the tax years 1948, 1949 and 1950. The assessments were made pursuant to the provisions of the "railroad tax law of 1948", P. L. 1941, ch. 291, as amended by P. L. 1942, ch. 169, and further amended by P. L. 1948, ch. 40, R. S. 54:29A-1 et seq.

As was pointed out in *Norton* v. *State Board of Tax Appeals*, 134 N. J. L. 57 (E. & A. 1946), and again in *Delaware, Lackawanna & Western Railroad Co.* v. *Division of Tax Appeals*, 3 N. J. 27 (1949), the tax levied on railroad property had for years been continuously in litigation and such litigation still continues.

Previous to 1941 there was a straight property tax on Class I and Class III railroad property the proceeds of which are applied to uses of the State. That tax was computed upon the entire assessed valuation of such property at the average rate of taxation in the State for such year (R. S. 54:24-2). The average rate was upheld in *Central Railroad Co. of New Jersey* v. *State Tax Department*, 112 N. J. L. 5 (E. & A. 1933), certiorari denied 293 U. S. 568 (1934), 55 S. Ct. 79, 79 L. Ed. 667. In 1941 a new method of taxing such property was enacted, P. L. 1941, ch. 291, amended in 1942 by P. L. 1942, ch. 169, which in substance provided for a combination property and franchise tax computed in a given year on the basis of the net operating income of a railroad system for the preceding calendar year.

By the Constitution of 1947 it is provided that all real property assessed and taxed for allotment and payment to local taxing districts shall be taxed at the general tax rate of the taxing district in which the property is situate, Art. VIII, Sec. I, par. 1. It therefore became necessary to amend the railroad tax law to provide for a straight property tax at the local rate upon Class II railroad property. This entailed a substantial increase in such taxes and the Legislature amended the railroad tax law to provide drastic reductions in Class I (main stem) and Class III (tangible personal property) railroad property and in the franchise tax, P. L. 1948, ch. 40; R. S. 54:29A-23. This resulted in average total tax assessments for the years in question on Class I and Class III property of $452,541.34 and franchise taxes of $301,073.67. For those years the assessed value of that property averaged $42,144,192 and the percentage of the total combination property and franchise tax to property valuations for such years averaged 1.788%.

The appellant seeks by these appeals to have its franchise tax assessments reduced to the statutory minimum of

$4,000.00. In short it seeks to limit its combination property and franchise tax assessments to substantially the amounts assessed on its Class I and Class III property for the years in question.

If this appellant should be required to pay only the statutory minimum franchise tax of $4,000.00 per annum then the total average assessment for the years in question would constitute only 1.07% of its Class I and Class III property.

It must be remembered that the new method provided by the Legislature for taxing railroad property used in transportation service in this state was designed to give some measure of relief to the railroad companies in poor earning years and it gives the State an additional return in good earning years. *Delaware, Lackawanna & Western Railroad Co.* v. *Division of Tax Appeals*, supra. The record here shows conclusively that the years in question included "good earning years" under the formula devised in 1941.

As pointed out above the Class I and Class III property of appellant under the straight property tax law would have been subject to tax at the average rate of taxation. For the year 1948 this would have been 5.90%, for 1949—6.139%, and for 1950—6.201%. At such rates the tax would have been as follows, for 1948—$2,583,939, for 1949—$2,528,554, for 1950—$2,556,746.

It is quite obvious that the combined property and franchise tax as levied was but a fraction of the tax that would have been levied under the old straight property tax law upon Class I and Class III property. Since the record discloses a clear legislative intent to prevent the use of accounting practices which would allow further unintended deductions and since legislation must be accorded a rational interpretation consistent with its manifest purpose, *Grobart* v. *Grobart*, 5 N. J. 161 (1950), a construction should not be adopted that would lead to such further drastic reduction unless it can be shown the words of the statute clearly so require or the application of the recognized rule of construction leads to no other conclusion. Not only can this not be shown but, on the contrary, the language of the statute and the rules of statutory construction leads us to the conclusion that the Legislature never intended the construction urged here by the appellant.

We reaffirm what was said in the *Norton* and *Delaware, Lackawanna & Western* cases. The "railroad tax law of 1948" constitutes a new method of taxing property located in New Jersey and used in the furnishing of transportation service in this state. The law provides a combination property and franchise tax computed in a given year on the basis of the net operating income of a railroad system for the preceding calendar year. The justification for the tax is the presence in the state of Class I and Class III property of great value, which is essential to system operations. As a measure of the amount which must be paid in tax upon such property used on system operation, the Legislature has fixed a very low direct property tax to which has been added an additional amount to be determined by *the* results of such system operations, the total being far below the former straight property tax.

R. S. 54:29A-13 provides:

> "An annual franchise tax is hereby levied upon all railroads operating within this State, which shall be assessed at the rate of ten per centum (10%) upon the net railway operating income of the preceding year, computed and allocated in the manner hereinafter provided, of each system and of each railroad not part of a system, subject to the maximum and minimum provisions set forth in section 20 (c) hereof, L. 1941, c. 291, p. 777, § 13, as amended L. 1948, c. 40, p. 116, § 5."

The present dispute concerns what the Legislature meant by the word "system".

R. S. 54:29A-2 provides the following definition of the word "system":

> " 'System' means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract,

and for which separate operating accounts are not maintained."

The different contentions of the parties are that the State says the Legislature was concerned with the actuality of the use of the properties of the appellant in New Jersey and Pennsylvania as a single utility for the furnishing of transportation service while the appellant maintains that, notwithstanding the properties may be used in such manner from the standpoint of physical operation, the legislative intention was to exclude a portion of an otherwise proven system because of the manner in which it keeps its accounts.

The railroad tax law also provides by section 11 that "Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder, other than assessments for benefits", and by section 12 "Property taxable under this act shall be assessed by the commissioner to each system and to each railroad not part of a system by which such property is used for railroad purposes. The assessment shall be made in the manner hereinafter provided."

The statute mentions only two situations; 1, a system operation and 2, an independently operating railroad which is not a part of a system. No provision is made for the levying of a tax on a part of a proved system.

The Lehigh Coal & Navigation Company, hereinafter referred to as the Coal Company owns and has at all times in question owned all of the lines of the appellant located in Pennsylvania except a very few miles of branch line. For many years prior to 1941 the appellant leased this property from the Coal Company and operated it as the Lehigh & Susquehanna division.

It is interesting to note that in 1942, the Trustees in reorganization of the appellant appealed its franchise tax assessments claiming that divisional accounts of the Lehigh & Susquehanna division were the separate operating accounts intended by the Legislature and that such accounts must be excluded in determining the franchise tax base upon which the franchise tax assessment was calculated. The State Board of Tax Appeals dismissed the appeal, *In re*

Pitney, 20 N. J. Misc. 448, 474 (1942), holding that the Legislature did not intend to limit the meaning of the first sentence of the definition as contained in R. S. 54:29A-2 by the second sentence thereof. The former Supreme Court granted certiorari but the appellant withdrew its appeal and similar appeals for 1943 and 1944 in December, 1945. *State v. State Board of Tax Appeals*, 134 N. J. L. 34 (Sup. Ct. 1946).

In 1939 a Mr. William Wyer made two studies of the properties of the appellant, particularly as to the operation of those in Pennsylvania one a segregation study whereunder revenues were apportioned to designate parts of the system and the other a severance or separation study which went into the question of what would happen if the New Jersey and Pennsylvania properties were actually operated separately. These studies showed large profits were being earned by the lines in Pennsylvania and large deficits were occurring from the lines in New Jersey and the plan to separate the lines was formulated. Mr. Wyer testified in this case that if there was actual separate operation of the lines in the two states there would be traffic shifts and that a substantial loss of income would result to both operations. He went on to say, with respect to the contemplated set-up, hereafter to be alluded to, "We didn't anticipate that the total revenue of the Central Railroad Company of New Jersey and the Central Railroad Company of Pennsylvania would be any different than the revenue formerly received by Central Railroad Company of New Jersey." From the very beginning it is apparent that any separate and independent operations envisaged by the "separation study" were not contemplated—that the plan never contemplated the arms' length bargaining of two separate and wholly independent operating companies.

In furtherance of the proposed plan for the separation of the line in Pennsylvania and New Jersey the name of a wholly owned subsidiary of the appellant, the Easton & Western Railroad Company, a Pennsylvania corporation, was changed to the Central Railroad Company of Pennsylvania hereinafter referred to as C. R. P., and the appellant began negotiations with the Coal Company regarding

the transfer of the leased properties in Pennsylvania to the C. R. P. In his studies Mr. Wyer spoke of the advisability of assigning the lease of the Coal Company properties, whereby the appellant would be relieved of all liability thereunder but he testified the appellant was not successful in this respect. On the contrary the agreement between the appellant and the Coal Company granting approval of the sublease relieves in no respect the liability of the appellant under the original lease, the appellant remains bound as heretofore. In addition, by that agreement the appellant has covenanted to maintain the continuity of its main line of railroad from the state line to the important New York terminal area. Also the agreement, to which the C. R. P. was not even a party, provides that there shall be only a single division of through rates between the Jersey Central Lines (appellant and C. R. P.) and connecting carriers which shall be further subdivided between appellant and C. R. P. according to a formula agreed upon by the appellant and the Coal Company. In short the arrangement with the Coal Company cannot be said to have contemplated separate operations. On the contrary the arrangement insofar as the furnishing of transportation is concerned, contemplated the continued operation of the Pennsylvania properties as part of the Jersey Central System as heretofore.

Thereafter the proposed form of agreement between the Coal Company and the Central Railroad Company of New Jersey, hereinafter referred to as C. N. J., and the sublease to the C. R. P. was prepared. This agreement also evinces a plan not to maintain separate operations of two truly independent operating railroads. The provision for the maintenance of depreciation accounts and those for the payment of per diem car hire by the C. N. J. on its own equipment are but two factors showing that true separate and independent operation by the two companies was never contemplated.

The United States District Court, on petition of the appellant, approved the sublease of the Pennsylvania lines of the appellant to C. R. P., the making of the agreement with the Coal Company, which among other things fixed the

division to be received by C. R. P., and the establishing of C. R. P. as an operating company, subject to the further approval of the Interstate Commerce Commission. That commission found that the "sublease of the lines in Pennsylvania from the trustees to the applicant (C. N. J. to C. R. P.) would result in no change in train service. * * * The trains would operate just as they do today * * *;" and that, with respect to the important coal movements, the great part of which come into the State of New Jersey "the system function of the facilities would be precisely the same whether the movement in Pennsylvania to the Delaware River were begun and carried on in the name of the trustees (C. N. J.) or in the name of the applicant" (C. R. P.).

Concerning the proposed accounting the Interstate Commerce Commission report said:

> "One of the benefits claimed for the proposals herein is that the trustees will not have to carry two separate sets of accounts, yet the trustees and the applicant (C. R. P.) would have separate books."

Thus the evidence is persuasive that even before any purported separate operations were undertaken from the standpoint of furnishing transportation service the appellant always intended to operate the Pennsylvania properties exactly as such properties were then being operated as the Lehigh & Susquehanna Division of the C. N. J.

The alleged separate operation of the two companies began on August 5, 1946. On that day all foreign lines were notified that all settlements with "Jersey Central Lines" would be subdivided between C. R. P. and C. N. J. according to a table. All division agreements continued to be those of a single entity, the "Jersey Central Lines." The two companies were known and advertised as a single operating entity, the "Jersey Central Lines." The Division of Tax Appeals pointed out below that:

> "One of the appellant's own witnesses who testified that he originated the term, stated that it embraced 'all of the railroad companies operated or controlled' by C. N. J. Another witness stated that Jersey Cen-

tral Lines, and we quote, 'is more or less in the nature of a trade name, which identified * * * the Central Railroad Company of New Jersey and the various railroads that form part * * * of the system'. The record goes so far as to reveal the rather small detail that even the telephone number of C. N. J. may be found under the listing 'Jersey Central Lines'. Additionally, form cards interchanged with foreign roads relating to car interchange were headed by the same general description."

The record discloses that what the Interstate Commerce Commission foresaw in fact materialized—that train service upon the lines is run in exactly the same manner as when the lines of the present C. R. P. were the Lehigh & Susquehanna Division of the C. N. J. and we agree with the Division of Tax Appeals that the record leaves no doubt as to the manner in which the properties are operated. The proof is clear and convincing that the appellant operates its Class I and Class III property in New Jersey and the leased property of the Coal Company as a single entity for the furnishing of transportation services. Thus the appellant operates the properties in Pennsylvania as a part of a system within the meaning of the first sentence of the statutory definition.

The appellant argues that the operating accounts proviso the second sentence of the definition was intended to exclude a railroad which otherwise would constitute a part of a system. With this we cannot agree. As stated, the purpose of the act was to provide a combination tax in lieu or substitution of a straight property tax predicated upon the use of property in this State. If the plan or device used by this appellant can be permitted then the very purpose sought to be attained by the act can be destroyed at the will of the tax paying railroads. That this could not have been the legislative intent is shown by Exhibit CR-4 the "Report on Railroad Taxation" by the Joint Legislative Committee made in 1941 in which appears the following "In considering and drafting the franchise formula every precaution has been taken to render it as nearly impossible of evasion

as it could be" and "Because of the suggested reduction in rates at which railroad property is liable to taxation, the Committee does not feel justified in recommending any alterations resulting in further reductions in future tax liability."

It is a cardinal rule of statutory construction that legislation should be construed so that, if possible, full force and effect shall be given every sentence, clause and word thereof. *Steel* v. *Freeholders of Passaic*, 89 N.J.L. 609 (E.&A. 1916); *Bogert* v. *Hackensack Water Co.*, 101 N.J.L. 518 (E.&A. 1925); *Oldfield* v. *New Jersey Realty Co.*, 1 N.J. 63 (1948).

The construction claimed by the appellant would result in a tax upon a part of a system. As pointed out above the statute provides for a tax to be assessed to each system and to each railroad not part of a system. R.S.54:29A-12. A franchise tax is also levied upon the net operating income of the preceding year of each system and each railroad not part of a system. R.S.54:29A-13. There is no provision in the law for the taxing of part of a system. There was no legislative intention to exclude any part of a system by the second sentence of the definition. Thus only can full force and effect be given to every sentence, clause and word of the railroad tax law as required by the rule of the *Bogert*, *Steel* and *Oldfield* cases, *supra*.

As stated appellant argues that the second sentence of the definition was intended to exclude a company in the position of the Central Railroad, although otherwise it might be held to be a part of its system. The intention of the Legislature as expressed in a statute should be ascertained and given effect. *Norton* v. *State Board*, *supra*. The words "for which" obviously refer to the clause "all companies the property of which is so operated." In the instant case this means the Lehigh Coal & Navigation Company whose property is operated by the Jersey Central Lines. There is nothing in the record or the legislative history of this legislation to support the premise that this portion of the definition was intended to include a situation where a taxpayer would operate its own property through a wholly owned subsidiary and thereby escape tax liability.

No limitation or exclusion was intended by the second

sentence of the definition. If it was intended to narrow or limit the broad language of the first sentence or exclude any part of a proved system, then inept language was used for that purpose. As was said in *State of New Jersey* v. *Rosecliff Realty Co.*, 1 N.J. Super 94 (App. Div. 1948) "The verb 'include' has not been defined so as to give it such a restrictive meaning." See also *Baker* v. *Soltau*, 94 N.J. Eq. 544 (E.&A. 1923) and *Snegon* v. *Consolidated etc. Ins. Co.*, 117 N.J. Eq. 325 (Ch. 1934).

Also the word "separate", as it refers to operating accounts, does not, in our judgment, have the meaning attributed to it by the appellant—that it refers to accounts covering operations which, while unified in fact, are technically separate. "*Separate*" means individual, disconnected, divided, not united or associated. Black's Law Dictionary; Webster's New International Dictionary, 2nd Edition. The accounts in question are neither individual nor disconnected, they reflect the single result of a single unified operation. We reach this conclusion from the record of actual operations as well as the finding of the Interstate Commerce Commission that the appellant "will not have to carry two separate sets of accounts yet the trustees and the applicant (C.R.P.) would have separate books." Also in actual operation some of the books, such as car hire books, were not kept separately but kept together just as any other system operation.

The true meaning of any clause or provision of a statute ordinarily is that which best comports with the subject and general object of the statute. *Maritime Petroleum Corp.* v. *City of Jersey City*, 1 N.J. 287 (1949). It would seem just ordinary common sense that, if there be in fact a single system operation, there could be but a single set of operating accounts for such single operation, no matter how many sets of books or divisional accounts might be kept. Such was the legislative intent, the whole definition must be read together. If an independently operating company actually operates its own facilities and those of one or more other companies as a single entity for furnishing transportation services, then the latter company or companies is or are a part of the system. No exclusion was intended by the latter part of the second sentence. That

clause was intended to assure that there would not be included, because of the manner of control, any railroad which on its own part is a truly separate and independent railroad from the standpoint of furnishing transportation service. The clause means the separate operating accounts of a railroad which is truly separate and independent from the standpoint of furnishing transportation service.

With particular reference to the instant case we also find that the C.R.P. is in all things save its intangible and unsubstantial corporate entity the C.N.J. The stock ownership of C.R.P. is one hundred per cent in C.N.J. Under such circumstances even the books of the C.R.P. are not separate books but those of this appellant, the C.R.P. being a mere alter ego of the C.N.J. *Stockton* v. *Central Railroad Co. of New Jersey*, 50 N.J. Eq. 52 (Ch. 1892).

As we pointed out in *Delaware, Lackawanna & Western R.R. Co.* v. *Division of Tax Appeals, supra*, "It was the legislative purpose to have the state share with the railroad companies in good earning years and the purpose is only accomplished if we determine the true net operating income (for each system) for each respective accounting period." The definition in question was intended to be of aid to the Division of Taxation in the accomplishment of that objective. It was not intended as a means of defeating such purpose. It is apparent that, if the appellant were to prevail on this appeal, there will henceforth never be any "good earning years" for it insofar as the State of New Jersey is concerned from a tax revenue standpoint.

Since the new method of taxing railroad property was adopted in 1941 the state taxing authorities have consistently interpreted the statute as not intending any limitation by the second sentence of the definition. When the amendment of 1948 was adopted the language in question was left exactly the same. The State contends that the appellant is estopped to deny the interpretation given to the language of the statute by the State Tax Commissioner because of certain representations made on behalf of appellant when the 1948 amendments were before the Legislature. We need not decide this point but such facts are persuasive that when the Legislature had the matter before it in 1948 it was fully aware of the administrative con-

struction and was in accord that such was the correct interpretation of the law. *Ford Motor Co.* v. *New Jersey Dept. of Labor & Industry*, 7 N.J. Super 30 (App. Div. 1950); 2 Sutherland Statutory Construction, par. 5105 (3rd Ed. 1949). Also in the *Norton* case, *supra*, the Court pointed out that the Director was given broad power to assure that the true net operating income would be determined. We held in the *Delaware, Lackawanna & Western* case, *supra*, when the Legislature amended the railroad tax law of 1948, that it must be assumed it acted with this judicial construction in mind.

The appellant says the statute as construed and applied by the Division of Tax Appeals violates the commerce clause and the equal protection and due process clauses of the 14th Amendment of the Federal Constitution. It made the same claim in its appeal from its 1946 franchise tax which we decided against the appellant in *Gardner, Trustee* v. *Division of Tax Appeals*, 3 N.J. 27 (1949). An appeal was taken in that case to the United States Supreme Court, which was dismissed on the State's motion. *Central Railroad Company of New Jersey* v. *Division of Tax Appeals*, 338 U.S. 946 (1950), 70 S.Ct. 488, 94 L.Ed. 583.

Appellant has placed great reliance in its argument that the statute violates the commerce clause of the Federal Constitution upon *Spector Motor Service* v. *O'Connor*, 95 L. Ed. Adv. Ops. 435 (April 9, 1951). This case dealt with the imposition of a State tax "upon the privilege of carrying on a business that was *exclusively* interstate in character." In the case before us the appellant maintains Class I and Class III properties in this State in connection with the furnishing of both intrastate and interstate commerce. The Supreme Court held in the *Spector* case that the State is not precluded from imposing taxes upon other activities or aspects of a business which, unlike the privilege of doing interstate business, was subject to the sovereign power of the State, and that those taxes may come out of funds derived from a taxpayer's interstate business, provided the burden is reasonably related to the powers of the State and non-discriminatory. Nothing contained in this opinion gives even color of support to the contention of the appellant. On the contrary our examination of it supports the

constitutionality of the combination tax under review. The Supreme Court carefully pointed out that its conclusion was not in conflict with *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653 (1947), 68 S.Ct. 1260, 92 L.Ed. 1633, a case cited by that court in its *per curiam* opinion dismissing the appeal of the appellant from a franchise tax assessment wherein similar Federal constitutional questions were raised. *Central Railroad Company of New Jersey* v. *Division of Tax Appeals, supra.*

The judgments are affirmed.

A true copy
CHARLES K. BARTON,
Clerk

Filed

Oct. 1, 1951

CHARLES K. BARTON
Clerk

SCHEDULE B

PERTINENT SECTIONS OF P.L. 1948, CHAPTER 40

2. Definitions. As used in this act, unless the context clearly requires a different meaning:

"Railroad" means any common carrier by railroad engaged in, owning or constructing facilities for, the transportation of persons or property in or through this State, other than a street railway or traction company using or occupying the public streets, highways, roads or other public places, the taxation of which is otherwise provided by law.

"System" means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract, and for which separate operating accounts are not maintained.

N.J.S.A. 54:29A-2

* * *

13. Franchise excise. An annual franchise tax is hereby levied upon all railroads operating within this State, which shall be assessed at the rate of ten per centum (10%) upon the net railway operating income of the preceding year, computed and allocated in the manner hereinafter provided, of each system and of each railroad not part of a system, subject to the maximum and minimum provisions set forth in section 20(c) hereof.

N.J.S.A. 54:29A-13

* * *

14. Measure of franchise tax. For the purpose of this article, net railway operating income shall be computed as total railway operating revenues from all sources, including any revenue whatever derived directly or indirectly from property which is used for railroad purposes, less costs of railroad maintenance, operation, depreciation and amortiza-

tion, railway tax accruals, uncollectible railway revenues, rentals (both debits and credits) for equipment leased for less than one year or interchanged, and joint facility rents (both debits and credits). Deductions from operating revenues for depreciation, additions and betterments, and compensation for personal services shall be subject to regulation by the commissioner, as to reasonableness of amount and appropriateness of accounting distribution.

Depreciation and amortization charges shall in no instance, however, exceed the amounts permitted by the Interstate Commerce Commission in determining the net railway operating income of the railroad for the year under consideration.

For the purpose of determining the measure of the tax imposed by this act, net railway operating income of each system, and of each railroad not part of a system, shall be allocated to this State in the proportion that the number of miles of all track over which the railroad or system operates in this State bears to the total number of miles of all track over which it operates.

N.J.S.A. 54:29A-14

(9400)

FILED
JAN 8 1952
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
BENJAMIN C. VAN TINE,
Deputy Attorney General of New Jersey,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY,

Appellee

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT OF APPELLEE, STATE OF NEW JERSEY, MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL, THE JUDGMENT IN QUESTION, INCLUDING APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT.

The Appellee, State of New Jersey, believing that the matters set forth below will demonstrate the lack of jurisdiction of the Supreme Court and the lack of substance in the questions raised by this appeal, files this, its statement

in opposition to Appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal for lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey on the ground that the questions raised by the Appellant are so unsubstantial as not to need further argument.

The Appellant seeks a review of a judgment of the Supreme Court of New Jersey on direct appeal from that Court. Appellee respectfully asserts that jurisdiction to hear such appeal is lacking under the statute and, furthermore, that the grounds stated by the Appellant appear on the face of the record to be so unsubstantial as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters relied upon by Appellee are more particularly stated below:

1. Matters and Grounds Making Against Jurisdiction

The Appellant, a New Jersey corporation, operating a railroad in New Jersey, owned and used Class I ("main stem") and Class III ("tangible personal property") properties for railroad purposes in the said State during the years in question of the following value:

Year	Class I Property	Class III Property	Total Class I and Class III	
1948.....	$32,133,136	$11,831,934	$43,965,070	(A 9a-28)
1949.....	32,179,007	9,058,234	41,237,241	(A 19a-20)
1950.....	32,233,651	8,997,541	41,231,192	(A 30a-25)

The "main stem" is the roadbed, tracks, appurtenances, ballast and structures as defined in N. J. S. A. 54:29A-2 (Appendix A, p. 23). "Tangible personalty" includes the rolling stock, cars, locomotives, machinery and the like as defined by the said N.J.S.A. 54:29A-2 (Appendix A, p. 23), with the limitation that tangible personal property that is kept but a part of the time in New Jersey shall only be

assessed a proportionate part of its value (N. J. S. A. 54:29A-9; Appendix A, p. 25).

Prior to 1941, a straight property tax was levied on Class I and Class III property used for railroad purposes in this State (N. J. S. A. 54:21-1; Appendix A, p. 21). The money so raised was applied to the uses of the State (N. J. S. A. 54:24-6; Appendix A, p. 23), while the entire amount of the tax derived from Class II property as defined in N. J. S. A. 54:22-1 (Appendix A, p. 21) was allotted to the local taxing districts (N. J. S. A. 54:24-11, Appendix A, p. 23). The said Class I and Class III property was computed at the "average rate of taxation" in the State, which rate was determined by dividing the aggregate taxes by the aggregate value of general property in the State (N. J. S. A. 54:24-2 and 3, App. A, p. 22). This method of determining the tax rate was sustained in *Central Railroad Company of New Jersey* v. *State Tax Dept.*, 112 N. J. L. 5 (E. and A. 1933), cert. den. 293 U. S. 568 (1934).

The "average rate of taxation" for each of the years in question was (Ex. S-17; R. 182a):

1948 — 5.904%
1949 — 6.139%
1950 — 6.201%

A straight property tax upon Class I and Class III property for such years at the average rate of taxation would have yielded the following amounts for state uses:

Year	Class I Tax	Class III Tax	Total Class I and Class III Tax
1948	$1,897,140.35	$698,557.38	$2,595,679.73
1949	1,975,469.24	556,084.98	2,531,554.22
1950	1,998,808.70	557,937.52	2,556,746.22

Such method of taxing property used for railroad purposes in this state was sustained in *Central Railroad Company of New Jersey* v. *Thayer Martin*, 114 N. J. L. 69 (Sup. Ct.

1934); *Lehigh Valley Railroad Company* v. *Martin*, 100 Fed. Rep. 2nd 139 cert. den. the present appellant 306 U. S. 651 rehear. den. 306 U. S. 670 (1939); and *Central Railroad Company of New Jersey*, 115 Fed. Rep. 2nd 968, cert. den. 313 U. S. 568 (April 1941), the Circuit Court citing *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 310 U. S. 362, 370 (1940).

During such litigation, the several railroad companies had urged that earnings should be considered in determining the tax burden to be borne by the railroads operating in this State. (See comment of the Court in *Lehigh Valley* v. *Martin, supra*, at page 142, and *Central Railroad* v. *Martin, supra*, 115 F. 2nd at page 971).

On July 21, 1941, just a few months after the final determination of the last mentioned case, the New Jersey Legislature devised a new method for taxing property used for railroad purposes in this State. Commenting upon this new method, the highest court in New Jersey said in *Norton* v. *State Board*, 134 N.J.L. 57, 58, (E. and A. 1946):

> "The tax levied on railroad property had been for years in litigation and large amounts of these taxes were in default. In 1941 a new method of taxing such property was enacted, Pamph. L. 1941, ch. 291. This act was amended the following year by Pamph. L. 1942, ch. 169 (R.S. 54:29A-1 et seq.). These laws in substance, provide a combination property tax and franchise excise tax computed in a given year on the basis of the net operating income of a railroad system for the preceding calendar year."

And at page 59:

> "The new system was devised to provide some measure of tax relief for the railroads in poor earning years while providing for a greater return to the State in times of high earnings."

In short, the Legislature sought to give weight to the earning experience of the respective railroads in determining the share of the tax burden to be borne by them. But the new act was always intended to be a revision of the former straight property tax (N.J.S.A. 54:29A-74 App. A, p. 24) and the new combination tax a new method of taxing property used for railroad purposes, based upon the earning experience of the entire railroad system, as defined in N.J.S.A. 54:29A-2 (App. A, p. 23), which is used in conjunction with the New Jersey properties.

Because the New Jersey Legislature applied the new method also to Class II (local use) properties, the "railroad tax law of 1941" was vigorously attacked as unconstitutional by the City of Jersey City. The new method was just as vigorously defended by the principal railroads operating in New Jersey. The 1941 tax law was declared to be constitutional in its entirety in *Jersey City* v. *State Board*, 134 N.J.L. 239 (E and A 1946), modifying 133 N.J.L. 202 (Sup. Ct. 1945) wherein the new law had been found to be unconstitutional for the year 1941.

In 1947, a new Constitution was adopted in New Jersey, which provides in part in Article VIII, sect. I, par. 1, as follows:

> "* * * All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

This provision of the new Constitution required that the "railroad tax law of 1941" be amended in order to provide again for a straight property tax at the local general rate on Class II (local use) property. But this meant that

the taxes on such Class II property would be substantially increased and the railroad companies immediately sought tax relief by a further reduction in Class I and Class III taxes.

The Legislature amended the tax law to provide for a straight property tax at the local rate on Class II (local use) property but by "the railroad tax law of 1948", provision was made for much lower taxes on Class I and Class III properties so that in effect, the State absorbed at the State level a great part of the increased amount of taxes caused by the change in the Constitution.

Exhibit S-15 (R. 178a) shows how this Appellant benefited in the years 1948 and 1949 by reductions made in the State level taxes of the Appellant. Thus the total amount of taxes received from the Appellant for State uses was $966,949.58 less in 1948 than such taxes would have been if the State had continued to collect for State uses the amounts required by the "railroad tax law of 1941" before the amendments of 1948; for 1949 the reduction was $1,405,761.97.

The total assessments made against this Appellant under the "tax law of 1948" were as follows:

Year	Class I and Class III Property Tax	Franchise Tax	Total Tax	Percent of Tax to Property Valuation
1948.....	$438,482.52	$213,228.10	$651,710.62	1.48%
1949.....	446,984.23	435,436.50	882,420.73	2.14%
1950.....	472,157.28	254,556.40	726,713.68	1.76%
3 Year Total....	$1,357,624.03	$903,221.00	$2,260,845.03	1.788%
3 Year Average..	452,541.34	301,073.67	753,615.01	1.788%

Thus for the privilege of owning and operating the main line of its railroad through the very heart of the metropolitan district of northern New Jersey, this Appellant is asked to pay total taxes upon essential property at the rate of less than 2%. This is far below the amount

which the State could reasonably have collected under its straight property tax at the "average rate of taxation". In fact the total amount collected in the three years under review was less by some $300,000. than would have been collected at the "average rate of taxation" in any one of the three years 1948 to 1950.

The State of New Jersey respectfully submits that such a modest tax upon some $42,000,000. worth of property used for railroad purposes in this State cannot reasonably be open to attack as violative of the Federal Constitution and the reasons and argument advanced by the Appellant are so completely devoid of substance as to require this Court to dispose of this matter summarily on this motion.

A. There Are No Federal Questions

The Supreme Court is without jurisdiction of an appeal under 28 U.S.C.A. 1257 (2) unless there was "drawn in question" before the Supreme Court of New Jersey the validity of the state statute under review. The opinion of the Court below shows that Appellant did not claim that the statute violates the Federal Constitution. Rather the Appellant questioned the construction and application thereof by the Division of Tax Appeals.

But if this were not so clear upon the record, the Appellant's assignment of errors and statement as to jurisdiction, including statement of questions involved, disclose that the Appellant is still complaining of the construction placed upon the railroad tax law by the New Jersey Supreme Court. The Appellant no where says forthrightly that the New Jersey statute is unconstitutional. The Appellant's approach is exactly the same as in *Central Railroad Company* v. *Division of Tax Appeals*, 3 N.J. 27 (1949), appeal dismissed, 338 U.S. 946 (1950).

In *Charleston Fed. Sav. & L. Asso.* v. *Anderson*, 324 U.S. 182, 187 (1945), this Court said:

> "Appellants in their assignment of errors in this Court have failed to attack the state statute as repugnant to the Constitution, stating only that the finding and judgment below sustaining the assessment violate the equal protection clause. Even where the federal question has been properly raised below, an appeal under § 237 (a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here."

The Appellant in its reply brief below said (Arb 28-5):

> "The Attorney General makes the point that from the standpoint of affording transportation service to the public, CNJ and CRP are operated as "a single utility for furnishing transportation service" (Rb 43-20). As we have already pointed out in this brief (p. 2) this is not disputed. Indeed, so far as we know, there is no fact material to this case which is in dispute—all of the facts being matters of record."

It would therefore seem that it is not necessary at this time to call attention to the many decisions of this Court holding that the findings of the State Court on matters of fact are conclusive. We therefore accept the findings of the Division of Tax Appeals (A 46a-12) and the Supreme Court of New Jersey (opinion p. 8) as to such facts.

And so with respect to the construction placed upon the "railroad tax law of 1948" by the highest Court in the State of New Jersey. In *Aero Mayflower Transit Co.* v. *Board of R.R. Com.*, 332 U.S. 495, 499 (1947) it was said:

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function,

according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by state courts."

The Appellant cannot successfully maintain that the construction below is not correct.

The Appellant does not seriously challenge the constitutionality of the "railroad tax law of 1948" but seeks only a construction more favorable to itself. This is clearly shown by the conduct of the Appellant during the passage of the amendments to the railroad tax law in 1948. While the proposed amendments to the railroad tax law were in the course of preparation in 1948, the State Tax Policy Commission prepared a schedule of the return anticipated from the application of the proposed new formula (Exh. S-27; R. 190a). The Associated Railroads of New Jersey, including the Appellant (R. 66a-18). submitted a counter proposal designed to absorb at the State level the tax increase on Class II (local use) railroad property made necessary by the 1947 Constitution. (Ex. S-14; R. 176a).

The figures submitted in Exhibit S-27 of anticipated return from the Appellant were calculated on the basis of the State's construction of the tax law. It was testified for the State (R. 84a-23) and not denied that counter figures submitted on behalf of the Appellant and shown on Exhibit S-14, could not possibly have been realized without levying the tax against the Appellant on the basis of the construction claimed by the State.

It is clear why the Appellant acted in the manner it did when the proposed amendments to the railroad tax law were in the course of passage in 1948. The reductions proposed by the tax policy committee were very substantial and the Appellant wished to do nothing to

jeopardize the proposed tax program. It wanted the benefit of the reductions in Class I and Class III taxes as shown on Exhibit S-15.

It is equally clear why Appellant has not seen fit to state specifically at this time that the "railroad tax law of 1948" is unconstitutional. The Appellant does not wish to return to a straight property tax basis. And this is understandable. As has been shown, prior to 1948, the State levied a combination property and franchise tax, the property tax at the rate of 3% and the franchise tax at a minimum of 15% of the next preceding year net railway operating income. The Legislature could have left the property tax at 3% and given up the franchise tax, representing a very substantial reduction. The State can still return to a straight 3% tax which, as has been shown above, is less than one half of the "average rate of taxation". At a 3% rate, the tax on Class I and Class III property of this Appellant having a value of $42,000,000, the approximate average valuation for each of the years in question would amount to $1,260,000. This is more than $500,000. in excess of the average total tax for State uses actually levied for each of those years. The Appellee respectfully submits that the Appellant does not seriously challenge the constitutionality of the method presently used for determining the tax liability of the railroad companies using property for railroad purposes in this State.

But even were the Appellant explicitly challenging the validity of the "railroad tax law of 1948", the questions presented are so unsubstantial as to require the Supreme Court to dispose of the matter summarily by dismissing the appeal or affirming the judgment.

B. No Substantial Federal Question Is Raised

The presence of a substantial Federal question is essential to invoke the jurisdiction of this Court. If the ques-

tions presented are plainly unsubstantial, this Court will not take jurisdiction; *Levering and Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933). A claim of unconstitutionality is unsubstantial where it is "obviously without merit", or "its unsoundness so clearly results from previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Levering and Garrigues Co.* v. *Morrin, supra; Ex parte Poresky*, 290 U.S. 30, 32 (1933).

As shown above, New Jersey's highest Court construed the "railroad tax law of 1941" in *Norton, Trustee*, v. *State Board, supra* (1946). After passage of the 1948 amendments the new Supreme Court again construed the railroad tax law in *Central Railroad Co.* v. *Division of Tax Appeals, supra*, and the companion *Delaware, Lackawanna and Western Railroad* case. The Court reaffirmed the *Norton* case and said at page 37 (3 N.J. 27) with reference to the 1948 amendments:

> "Under such circumstances it must be assumed the Legislature acted with the judicial definition in mind."

In the instant case, the Court below, at page 3 of its opinion, reaffirmed what had been said in the *Norton* and *Delaware, Lackaawnna and Western* cases.

The railroad tax law provides (N.J.S.A. 54:29A-11):

> "Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder, other than assessments for benefits."

N.J.S.A. 54:29A-74 (App. A, p. 27) provides that the present railroad tax law is a revision of the earlier straight property tax law. Thus no tax can be levied upon any of the Class I and Class III property by the municipalities in which the property may be located.

The Appellant has pointed to no case which supports the contention that a combination property and franchise tax, which is but a small proportion of a former straight property tax, is violative of the Federal Constitution.

(1) Due Process of Law

In support of its argument, Appellant has cited *Norfolk and Western Railway Co.* v. *North Carolina*, 297 U. S. 682 (1936). In sustaining the tax, this Court said at page 688:

> "A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence."

The State respectfully submits that a tax at the rate of 1.788% on $42,000,000. worth of railroad property giving access to the New York Harbor area could not reasonably be said to be oppressive of the Appellant.

But, it may be asked, could the rate become oppressive under the statutory formula? Could the rate conceivably be higher than the "average tax rate"? The answer is unqualifiedly—No! As has been shown above the tax on the Class I and Class III property in question for the year 1948 at the "average rate of taxation" would have been $2,595,679. The combination tax actually levied was $651,710.62, a reduction of $1,943,969.

To receive an additional $1,943,969 in franchise tax, the net operating income allocated to New Jersey must be an additional $19,439,690. The allocation percentage is 67% so that to pay such additional tax Appellant must earn additional net railway operating income of over $29,000,000 after all Federal income taxes have been paid. In order to earn an additional $29,000,000 the company would be re-

quired to pay additional Federal income taxes of over $31,000,000. Thus there would have to be a sum of over $60,000,000 after payment of all operating costs except Federal income taxes in order for the tax liability of the Appellant on Class I and Class III property to even approach the old straight property tax liability. When we consider that the total combined railway operating revenues, before payment of any costs, was under $56,000,000 for 1947 (Ex. CR-10, A 264a-3 plus Ex. CR-13, A 288a-3) and under $64,000,000 for 1948 (Ex. CR-11, A 276a-3 plus CR-14, A 301a-3), net railway operating income of over $60,000,000 before Federal income taxes but after all other costs of operation would appear fantastic. The amount levied by the new tax formula for Class I and Class III taxes can never even approach the amount levied under the old straight property tax at the local rate.

The Appellant has also cited *Southern Railway Co.* v. *Kentucky*, 274 U.S. 76 (1927) and *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123 (1931). Neither are in point because neither involves a situation where the valuable property of the tax payer is located in the taxing State. In the *Southern Railway* case, this Court said:

> "* * * where property is part of a system and has its use only in conjunction with other parts of the system, that fact may be considered even though parts of the system are outside the State."

In our case, the State seeks to tax only the part of the system in the State of New Jersey. As a measure of the rate that property must pay, the operating income is used.

The New Jersey statute provides that, in computing the tax the net operating income shall be allocated according to track mileage (N.J.S.A. 54:29A-14, App. A p. 25); *Pittsburgh, C.C. & St. L.* v. *Backus*, 154 U.S. 421, 430, 431 (1894) fully supports such method of allocation.

The great value of the New Jersey railroad properties as the gateway to the New York Harbor has been repeatedly recognized. The Interstate Commerce Commission recognized it in the instant case (Exh. CR-8, A 243a-32). The New Jersey Legislature would have been fully justified in insisting upon added weight being given to such properties because of strategic location. Such course was given approval in *Fargo* v. *Hart*, 193 U.S. 490, 500 (1904); *Cleveland etc. R. Co.* v. *Backus*, 154 U.S. 439, 443 (1894); and *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920).

New Jersey has indeed been modest in its demands upon the Appellant by reason of its ownership and use of valuable Class I and Class III property in this State. It may not reasonably be said that the Appellant has been denied due process under the facts and circumstances of this case.

(2) Commerce Clause

To support its contention that the construction placed upon the "railroad tax law of 1948" violates the commerce clause of the Federal Constitution, the Appellant has cited eight cases. Not one of those cases presented a situation where the tax levied was in substitution of a much higher property tax.

Typical of the cases cited were *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 310 (1938), wherein this Court said:

> "It is not a tax in lieu of ad valorem taxes upon property which would be inoffensive to the Commerce clause."

and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438 (1939) wherein this Court said:

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of the local tax burden * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden.",

and *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609 (1950); wherein the Court said:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

and *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 (1948) which case was cited by this Court in dismissing the appeal of this Appellant in *Central Railroad Co.* v. *Division of Tax Appeals*, 338 U. S. 946 (1950).

In *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 700 (1895), this Court said:

> "In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the State and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State in the language we have quoted, did not amount to a regulation of the interstate commerce or put an unconstitutional restraint thereon."

The *Postal Telegraph* case was cited in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1937) wherein this Court said:

> "It was not the purpose of the Commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business".

and in *Adams Mfg. Co.* v. *Storen*, *supra*, where the Court said (p. 310):

> "It is not a tax in lieu of ad valorem taxes upon property which would be inoffensive to the Commerce clause",

and in *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157, 161 (1940), wherein the Court said:

> "To hold the net cannot constitutionally be taxed by Minnesota but must be reduced by the amount of payments made by Appellant for its use of cars in other states would be to deprive Minnesota of her jurisdiction over property within her borders",

and in *Joseph* v. *Carter and Weekes, S. Co.*, 330 U. S. 422, 427 (1946) wherein this Court said that an unapportioned tax on gross proceeds from interstate commerce was violative of the Commerce clause

> "Where the taxes were not in lieu of ad valorem taxes on property".

The Appellee respectfully submits that the decisions of this Court have consistently sustained the principle that a State may substitute a combination property and excise tax for a much higher straight property tax without in anywise violating the commerce clause of the Federal Constitution.

(3) Equal Protection of the Laws

The Appellant complains because the State has treated the Long Island Railroad Company as a separately operated railroad instead of a part of the Pennsylvania Railroad Company system and by so doing has compelled the Pennsylvania Railroad Company to pay higher taxes. If such were the case, it should be the Pennsylvania Railroad Company that should be making any complaint and not the Appellant. The record discloses no complaint by the Pennsylvania Railroad Company.

N. J. S. A. 54:29A-44 (Appendix A; p. 27) requires the several railroads to return to the Tax Director statements showing the net railway operating income. N. J. S. A. 54:29A-45 (App. A, p. 27) requires that the returns be sworn to. Pennsylvania Railroad Company did not include in its sworn return the operating accounts of Long Island. Since Long Island Railroad Company had ostensibly been operating independently for many years and since no claim had been made by Pennsylvania Railroad for inclusion in Pennsylvania operating accounts of Long Island Railroad deficits, the State taxing authorities had every right to rely upon the statements of the Pennsylvania Railroad Company.

There is nothing unusual about a railroad being operated separately although owned by another railroad company. The definition of system in the tax law (N. J. S. A. 54:29A-2) shows that such a situation was contemplated. The Appellant has shown that Baltimore and Ohio R. Co. which controls the Reading Railroad Company, the Reading which in turn owns the Appellant, and the Appellant each in turn carry on a separate and independent operation. They have so reported to the State as required by law. If these three independent railroad systems did not carry on separate operations and there was a tax advantage in a con-

solidated return, these companies had it within their power to submit such consolidated return duly sworn to according to law. The instant record shows no such action. The files of the Tax Department disclose no such request from these railroads or any other railroad.

But there is no similarity between the examples given by Appellant and the instant case. In those cases, the controlling company acquired control of another company, which in turn owned or leased its own property. In the instant case, the Appellant already had complete control by lease or direct ownership. It has merely leased or subleased its own property to a wholly owned subsidiary, the whole property being operated as a single system just as heretofore. In short, Appellant has merely sought to give an illusion of subdividing itself.

The importance of the New Jersey properties to the properties of the Lehigh Coal and Navigation Company was recognized by the Interstate Commerce Commission in its report (A 243A-32), wherein was said:

> "What the investment would be worth without the debtor's connecting Central division to tidewater does not appear, but preservation of this continuous route is a matter of concern to the coal company."

The State Tax Director was satisfied that the Pennsylvania properties of Appellant, were being operated as a part of the Appellant's system. The facts could lead to no other conclusion. He was required by law to determine the true net operating income. *Delaware, Lackawanna and Western R. Co. v. Division of Tax Appeals, supra,* and companion *Central Railroad Company* case. He therefore made the assessments in question on the basis of system operations.

The State Tax Director gave the same consideration to the returns of the several other railroad taxpayers. He

believes that he has made proper assessments. But even if the Director had erred in his determination as to other railroads, that cannot help this Appellant. That there might be such errors was foreseen by the Legislature. By N.J.S.A. 54:29A-25, (App. A, p. 26) the Director is given authority to correct any deficiencies. The exercise of this power is limited to 5 years by N.J.S.A. 54:29A-27 (App. A, p. 26).

Any action taken by the State Tax Commissioner based upon an erroneous factual conclusion with respect to another railroad company would not constitute a denial of equal protection of the laws to this Appellant under the 14th Amendment. In *Snowden* v. *Hughes*, 321 U. S. 1, 8 (1944), the United States Supreme Court said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

and at page 9:

> "Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others."

and at page 11:

> "Mere violation of a state statute does not infringe the federal Constitution."

The Court cited *Owensboro Water Works Company* v. *City of Owensboro*, 200 U. S. 38 (1905), wherein the Court held that unlawful acts of a governmental agency did not constitute a violation of the 14th Amendment.

The State respectfully submits that the "railroad tax law of 1948" requiring the determination by the State Tax Commissioner of the true net railway operating income does not deny equal protection of the laws to this Appellant.

Motion to Dismiss or Affirm

Appellee respectfully submits this statement showing there is no Federal question involved and consequently a lack of jurisdiction; and further that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument.

Wherefore, appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A

PERTINENT SECTIONS OF RAILROAD TAX LAW

New Jersey Statutes Annotated:

54:22-1.

The state tax commissioner shall sit at Trenton on the first Tuesday of March in each year, and as often during the year and at such places as his duties may require for the purpose of ascertaining the true value, as of the first day of January preceding, of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and he shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the waterway of each canal and the length of such main stem and waterway in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the roadbed (other then main stem), waterways, reservoirs, tracks, buildings, water tanks, waterworks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and of each canal company;

IV. The value of the remaining property, including the franchise.

The commissioner shall complete his valuations by the first day of November following and on or before December tenth next following he shall serve upon the treasurer of each railroad and canal company or leave at his office a statement of the assessed valuation of the property of such company in the state and of the separate valuation of the property of such company in each taxing district.

54:24-1.

The taxes which shall be assessed upon the property of railroad and canal companies, particularly described in sub-

divisions I, III, and IV of section 54:22-1 of this title, shall be assessed and levied in the manner hereinafter in this article provided.

54:24-2.

Upon his completion of the valuation of the property described in subdivisions I, III and IV of section 54:22-1 of this title, including the franchise, the commissioner shall assess such property and proceed to compute the tax thereon. The tax shall be computed upon the entire assessed valuation of such property, including the franchise, of each railroad and canal company, at the "average rate of taxation". The "average rate of taxation" shall be arrived at in the manner provided in section 54:24-3 of this title.

54:24-3.

The "average rate of taxation" shall be computed in the following manner: On or before April first in each year the assessor in every taxing district shall prepare and forward to the state tax commissioner a certificate, under his hand and seal, duly sworn to under oath, certifying to the commissioner the true value of all property, real and personal, located in his taxing district, other than the property of railroad and canal companies the taxation of which is provided for by this article, but including therein the assessed value of property of railroad and canal companies particularly described in subdivision II of section 54:22-1 of this title, and shall also certify and report the rate of taxation in the taxing district for that year. The aggregate value of all the property, real and personal, so certified, shall be deemed to be the aggregate value of the general property in the state. In each taxing district the amount obtained by multiplying the value of all the property in the taxing district by the rate of taxation therein shall be deemed to be the total taxes of the taxing district, and the aggregate of the total taxes so ascertained shall be deemed to be the aggregate taxes of the state. The "average rate of taxation" shall be computed and determined by the commissioner by dividing the aggregate taxes by the aggre-

gate value of the general property in the state. The rate so arrived at and determined shall be entered upon the records of the state tax department and shall constitute the "average rate of taxation" for that year.

54:24-6.

The money raised by the taxation of the property of railroad and canal companies, particularly described in subdivisions I, III and and IV of section 54:22-1 of this title, including the franchise, shall be applied to the uses of the state, according to law.

54:24-11.

The entire amount of tax derived from the assessment of property described in subdivision II of section 54:22-1 of this title shall be allotted to and paid over to the local taxing districts through which the railroads or canals run, giving to each district the total amount of tax that may be so derived from such property of each railroad or canal company therein.

54:29A-2.

As used in this act, unless the context clearly requires a different meaning:

"Railroad" means any common carrier by railroad engaged in, owning or constructing facilities for, the transportation of persons or property in or through this State, other than a street railway or traction company using or occupying the public streets, highways, roads or other public places, the taxation of which is otherwise provided by law.

"System" means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract, and for which separate operating accounts are not maintained.

"Main stem" of a railroad means the roadbed not exceeding one hundred feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls or foundations necessary to provide a width not to exceed one hundred feet at base of rail, together with all tracks, appurtenances, ballast and all structures erected thereon and used in connection therewith, but not including passenger or freight buildings erected thereon.

"Tangible personal property" means the rolling stock, cars, locomotives, ferryboats, all machinery, tools and other tangible personal property of a railroad company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this State, or run under its control in this State by a sleeping car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, but not forming part of the equipment of such road, shall not be included in the term.

"Taxpayer" shall mean any person, railroad or system subject to taxation under the provisions of this act.

"Commissioner" or "State Tax Commissioner" means the director of the Division of Taxation in the State Department of Taxation and Finance.

54:29A-4.

All the property of a railroad company not used for railroad purposes shall be assessed and taxed by the same assessors, in the same manner and at the same rate as the taxable property of other owners in the same taxing district.

54:29A-7.

There is hereby levied an annual property tax upon all property used for railroad purposes which shall be assessed by the commissioner, in the manner and at the rates hereinafter provided, for the year one thousand nine hundred and forty-eight and for each year thereafter.

54:29A-9.

Tangible personal property which is used or kept but a part of the time in this State by any railroad shall be assessed such proportionate part of its value as the time it is used or kept in this State during the calendar year preceding bears to the whole year.

54:29A-12.

Property taxable under this act shall be assessed by the commissioner to each system and to each railroad not part of a system by which such property is used for railroad purposes. The assessment shall be made in the manner hereinafter provided.

54:29A-13.

An annual franchise tax is hereby levied upon all railroads operating within this State, which shall be assessed at the rate of ten per centum (10%) upon the net railway operating income of the preceding year, computed and allocated in the manner hereinafter provided, of each system and of each railroad not part of a system, subject to the maximum and minimum provisions set forth in section 20(c) hereof.

54:29A-14.

For the purpose of this article, net railway operating income shall be computed as total railway operating revenues from all sources, including any revenue whatever derived directly or indirectly from property which is used for railroad purposes, less costs of railroad maintenance, operation, depreciation and amortization, railway tax accruals, uncollectible railway revenues, rentals (both debits and credits) for equipment leased for less than one year or interchanged, and joint facility rents (both debits and credits). Deductions from operating revenues for depreciation, additions and betterments, and compensation for personal services shall be subject to regulation by the commissioner, as to reasonableness of amount and appropriateness of accounting distribution.

Depreciation and amortization charges shall in no instance, however, exceed the amounts permitted by the Interstate Commerce Commission in determining the net railway operating income of the railroad for the year under consideration.

For the purpose of determining the measure of the tax imposed by this act, net railway operating income of each system, and of each railroad not part of a system, shall be allocated to this State in the proportion that the number of miles of all tract over which the railroad or system operates in this State bears to the total number of miles of all track over which it operates.

54:29A-25.

a. Whenever the commissioner shall determine that any tax or taxes assessed pursuant to this act were less than or in excess of the amount thereof lawfully assessable, he may correct such deficiency or error by reassessing such tax, or any part thereof.

b. Whenever property subject to taxation under this act has or shall have been omitted from assessment by failure of the taxpayer to include it in a return of information, or otherwise, the commissioner may, if he finds that such property has been omitted from his assessment, cause such property to be assessed for any omitted years in accordance with the provisions of this act.

54:29A-27.

The power of the commissioner to make reassessments or to assess omitted property under this act shall be limited to the period of five years next preceding the year in which the reassessment or assessment of omitted property is made; provided, however, that assessments of omitted property by the commissioner for any year prior to one thousand nine hundred and forty-eight shall be assessed at the rate of three dollars ($3.00) per hundred of assessed valuation.

54:29A-44.

a. On or before March first in each year, every taxpayer shall return to the commissioner statements or schedules showing the character and value of all its property, as it existed on the first day of January preceding, its capitalization and its indebtedness.

b. On or before April first in each year, every taxpayer shall also return to the commissioner statements or schedules showing its railway operating revenues of the preceding year, all deductions therefrom, and the net railway operating income remaining after such deductions.

54:29A-45.

All statements and schedules required to be returned to the commissioner shall be made and prepared in such detail, and shall contain such additional information necessary or convenient for the proper administration and collection of the taxes imposed by this act, as the commissioner may by regulation prescribe. Returns made by corporations shall be sworn to by the president, vice-president or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. Whenever a receiver, trustee or assignee is operating the property or business of a taxpayer, the receiver, trustee or assignee shall make returns and tax payments in the same manner and form as are required of the taxpayer.

54:29A-74.

All other State and local taxes of or upon franchises or property used for railroad purposes, which may have been assessed for the first year in which this act becomes effective upon any taxpayer subject to taxation hereunder prior to the enactment of this act, shall abate and be canceled of record as of the effective date hereof. This act shall be construed as a revision of chapters nineteen through twenty-nine, inclusive, of Title 54 of the Revised Statutes, and nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse or otherwise affect in any manner any assessment or the lien

or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which have accrued under any provision of law repealed by this act, or under any other law, except as specifically provided in this act, or to affect the right of the State Tax Commissioner to assess omitted property, and apportion the tax so assessed, for any year prior to one thousand nine hundred and forty-one, according to the classifications and at the rates prescribed in the chapters aforesaid. Nor shall this act affect in any manner any distribution allotment or apportionment of tax receipts made or required to be made under any provision of law repealed by this act.

(9705)

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 520

THE CENTRAL RAILROAD CO. OF NEW JERSEY,
Appellant,

vs.

DIVISION OF TAX APPEALS, NEW JERSEY STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,
Appellees.

Appeal from the Supreme Court of New Jersey

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appeal from the Supreme Court of New Jersey

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Preliminary Statement

The statement of the State of New Jersey of matters and grounds making against jurisdiction, and its motion to dismiss or affirm ignore the following important matters:

The Trustees in Bankruptcy of Appellant submitted to the bankruptcy court as a necessary step in its reorganization a plan to segregate the bankrupt's properties into two separate operating class I railroads, (1) Central Railroad Company of Pennsylvania,* and (2) The Central Railroad Company of New Jersey.† The bankruptcy court approved

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* Hereinafter sometimes referred to as CRP.

† Hereinafter sometimes referred to as CNJ.

this plan, subject to the permission of the Interstate Commerce Commission. The Interstate Commerce Commission, on application of Central Railroad Company of Pennsylvania to lease the lines of railroad in the Commonwealth of Pennsylvania, granted such permission, after a full hearing, as in the public interest. The State of New Jersey, by its Attorney General, appeared and objected to both said applications, on the ground that one of the purposes of the separation was to make the earnings of the property in Pennsylvania not subject to taxation by New Jersey, so that the State's revenues would be adversely affected (Ap. 231a-13; 241a-35 to 242a-10).* As to this, the Interstate Commerce Commission, in the report of its Division 4 (Ex. CR-8), said:

> "This is a proper objective, if accomplished in a lawful manner, the Supreme Court of the United States having said in *Gregory* v. *Helvering*, 293 U. S. 465, at page 469, that the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted" (Ap. 244a-10 to 20).

After having evinced such great concern over the possible tax consequences of Appellant's reorganization plan, before the Bankruptcy Court and the Interstate Commerce Commission, it is respectfuliy submitted that the State of New Jersey is now in no position to assert that the questions presented by this appeal are so insubstantial as to permit of their disposition without a plenary hearing by this Court.

Likewise, the State, in its motion, completely ignores the fact that since the complete separation of CRP from CNJ on August 5, 1946, both railroads have maintained completely separate organizations and have separately

* All Appendix references are to Appellant's Appendix below, which has been sent up as part of the Record.

accounted each year to the Interstate Commerce Commission, as separate and distinct Class I interstate steam railroad carriers, as required by the Transportation Act of 1920. The State completely ignores the fact that in each of the years under consideration, CNJ operated at a deficit, and that it was only through the arbitrary application of the statutory all-track mileage formula, ignoring the separate corporate existence and operation of Central Railroad Company of Pennsylvania, treating the two corporations as they existed prior to the separation on August 5, 1946, and lumping the net railway operating deficits of the CNJ with the net railway operating income of the CRP, that the State was able to assess, levy and collect the franchise taxes from which this appeal was taken. The State's motion asks the Court to dismiss the appeal without giving Appellant an opportunity to be heard, merely because, as it claims, the taxes assessed under the new Railroad Tax Act of 1948 are less than they would have been had they been assessed under the Act of 1888, which has long since been repealed. It asks this Court to determine that the taxes assessed against Appellant are valid merely because Appellant operates a railroad in New Jersey which does an important and necessary transportation business and has a valuable waterfront terminal in Jersey City.

The "great value" of these New Jersey properties to which the State refers, can best be measured by the terrific operating deficits of Appellant. Since it is axiomatic that property is worth no more than it can earn, *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76 (1927), it would seem to be proved that the New Jersey properties are not worth anywhere near what the State contends, for the profits from an efficient freight operation are consumed by severe losses in carrying thousands of New Jersey commuters daily and by the heavy State taxes.

POINT I

That this Court Has Jurisdiction Cannot be Doubted.

The State of New Jersey contends that this Court does not have jurisdiction because Appellant does not attack the statute as being unconstitutional *in toto* but merely as being unconstitutional as construed and applied. This contention flies in the face of decisions of this Court, commencing with *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921), which uphold the jurisdiction to review on appeal a claim that a statute is unconstitutional in a particular application.

The State also cites *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U. S. 182 (1945). That case is entirely distinguishable from the one at bar. In that case the appellant had merely claimed below that the *assessment* of taxes was unconstitutional, as denying equal protection; the appellant had failed to claim that the inequality resulted from construction of the taxing statute. In the case at bar, the Appellant has at every stage directed its complaint against the statute as construed and applied, and not merely against the action of the assessing officials.

What is more, the *Alderson* case actually is an authority in support of jurisdiction in the instant case. In that case, the Court said:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

As we have already pointed out in the Jurisdictional Statement, the *opinion* of the Supreme Court of New Jersey clearly shows that that Court was distinctly passing upon a claim by Appellant that the *statute* was unconstitutional.

POINT II

The Contention that Appellant Pays a Comparatively Small Total Tax is as Irrelevant as it is Inaccurate.

The Respondent's Statement Opposing Jurisdiction presents certain figures designed to create the impression that the appellant pays total taxes amounting to less than 2% of the value of its property used for railroad purposes in the State of New Jersey. At best in a case of this kind such a tactic is merely irrelevant; in the case at bar, however, it is little short of meretricious. The present appeal involves the validity of a *mode* of taxation and not of the amount of a particular tax assessment. If this Court were to sustain the present method of assessing taxes against the Appellant, the Legislature might thereafter raise both the franchise tax and property tax rates to an oppressive level, and the Appellant would be without recourse. As was said by this Court in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935):

> "Ignoring the glaring inequalities of burden resulting from the statute, the appellees tell us that if and when the load becomes too heavy upon any taxpayer he may with confidence invoke the Fourteenth Amendment. The position seems to be that different principles govern various forms of taxation, and that what has been held with respect to the unrestricted power of a legislature to determine the amount to be exacted by other forms of taxation has no application to an excise. We are unaware of any such distinction in logic and the authorities sanction none. Every taxing law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the legislature.

> "* * * Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax."

Furthermore, the computations set forth in the State's motion are inaccurate and misleading. In making these computations the State has omitted the very important item of taxes on class II property. Class II property consists for all practical purposes of yard and terminal facilities, and they are assessed at full value and taxed by the State for the use of the municipality in which located. Under the 1947 Constitution such property must be taxed at the local tax rate. The assessment sheets for the years in question show that the Appellant paid the following taxes upon its class II property:

1948 (Ap. 10a)	$2,571,118.99
1949 (Ap. 20a)	$2,244,538.86
1950 (Ap. 31a)	$2,287,729.76

The assessment sheets also show that the total taxes paid by Appellant in the years under review were as follows:

1948 (Ap. 10a)	$3,222,829.61
1949 (Ap. 20a)	$3,126,802.11
1950 (Ap. 31a)	$3,014,443.44

The record therefore shows that during the years 1948, 1949 and 1950 the Appellant paid total taxes to the State

of New Jersey which averaged over $3,000,000. per year. The record also suggests that during those years the New Jersey operations of the Appellant produced an average *gross* revenue of about $39,000,000. in each year. This figure for gross revenue is approximately the same whether we consult the I. C. C. Form A accounts filed by the Appellant or the allocation of "system" gross revenue on an all-track mileage basis made by the State in the assessment sheets. Compare, *e. g.*, Exs. CR-10 and 11, Ap. 264a and 276a with Assessment Sheets, Ap. 8a, 18a and 29a. For, as we have pointed out in the Jurisdictional Statement, the analytical accounts submitted by the Appellant divide the gross "system" revenue between CNJ and CRP in approximately the same proportion (67%) as does the state's allocation formula. It is therefore apparent that in each of the years here in question the Appellant has paid to the State of New Jersey total taxes amounting to over 7% of its gross revenue earned from railway operations carried on within or attributable to the State of New Jersey. What is more significant and serious is that in each of the years in question the total taxes payable to New Jersey alone consumed at least 75% of the net revenue from railway operations (before taxes) of the CNJ as shown by its Form A report to the I. C. C. (*e. g.*, Exs. CR-10 and 11, Ap. 264a-5 and 276a-5). Under these circumstances it can hardly be said that the Appellant does not pay a heavy tax to the State of New Jersey.

POINT III

The New Jersey Railroad Franchise Tax is not an "In Lieu" Tax.

The State of New Jersey contends that the Appellant is without standing to assert its rights under the Due Process and Commerce clauses for the reason that the present levy is assessed in lieu of a superseded *ad valorem* property tax which would have been greater in amount. The State thus seeks to bring the instant case within the doctrine, laid down in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688 (1895), that a tax unconstitutional in form may be validated upon the showing that it is actually a substitute for, and not disproportionate in amount to, an *ad valorem* levy. This, however, is an erroneous view of the tax involved here.

The principal fault in the State's argument on this point is that it insists upon speaking of the present case as though it arose under the Railroad Tax Law of *1941* (P. L. 1941, c. 291),* whereas in fact the Appellant has been assessed under, and attacks the validity of, the Railroad Tax Law of *1948* (P. L. 1948, c. 40). Under the 1941 law there was perhaps some color to the claim that the franchise tax was a property tax in its nature, since under that law the franchise tax base was computed by capitalizing the net railway operating income and deducting from the capitalized value thereof the assessed value of all tangible property taxed on an *ad valorem* basis (P. L.

* A good deal of confusion may arise from the fact that no less than three New Jersey Railroad Tax Laws have been discussed—the Laws of 1888 (repealed), 1941 (amended), and 1948. The Attorney General neglected to point out with sufficient clarity that the first six statutory sections quoted in the Appendix to his Motion are from the repealed Act of 1888.

1941, c. 291, §§13 to 15). Furthermore, the 1941 Law expressly provided that the Franchise Tax was to be an "in lieu" tax. Thus, in Section 13:

> "This tax shall be in lieu of any other tax or taxes of or upon such franchises" (P. L. 1941, c. 291, §13).

The 1948 Law, however, introduced sweeping changes in the franchise tax scheme. For one thing, the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N. J. S. A. Supp. 54:29A-13. For another, the franchise tax is now assessed at a stated percentage of the net railway operating income itself, without any reference to the capitalized value of such income or the value of tangible property taxed *ad valorem*. N. J. S. A. Supp. 54:29A-13. It is in form a tax measured by the net railway operating income.

In addition to this, the railroad's tangible property is taxed at its true value, either at the statutory rate for the use of the state or at the local rate for the use of the municipality in which the property is located. N. J. S. A. Supp. 54:29A-4, 16 to 24. What is more, in the assessment of tangible property there is no attempt made to allow for the fact that there is a specific tax on the franchise, since the tangible property is assessed at the value which it derives from its actual use as a part of a going railroad concern. *Pitney* v. *Kelly*, 21 N. J. Misc. 405, 422, 34 A.2d 547, 556 (St. Bd. of Tax App. 1943); *Erie R. R. System* v. *Walsh*, 26 N. J. Misc. 81, 94, 57 A.2d 217, 225 (Div. Tax App. 1948). It is well recognized in the law of New Jersey that a valuation which takes account of the going concern value of property is in effect taxation of the property value of the corporate franchise itself. *Long Dock Co.* v. *St. Bd. of Assessors*, 78 N. J. L. 44,

73 Atl. 53 (Sup. Ct. 1909), *aff'd* 79 N. J. L. 604, 80 Atl. 1135 (E. & A. 1910). It is quite obvious therefore that the franchise tax is in addition to, and not in substitution for, *ad valorem* taxes upon all of the property of the Appellant *including an ad valorem tax upon the franchise itself.*

Under these circumstances the *Postal Telegraph* doctrine is inapposite. The holding of the *Postal Telegraph* case is that the validity of the tax depends upon its true character as a property tax in fact and upon the appropriateness of the tax base as a substitute for *ad valorem* taxation. The comparison of the amounts payable under a straight property tax and under the tax said to be in lieu thereof is intended merely as a test to show the reasonableness and appropriateness of the substitute measure.

This Court has repeatedly and dramatically held that a tax upon income cannot fall within the protection of the "in lieu" doctrine when it is assessed in addition to an *ad valorem* tax. Thus, during the October term, 1911 the Court upheld the Minnesota gross receipts tax, *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335 (1912), while on the very same day the Court struck down as invalid the gross receipts tax of the State of Oklahoma, *Meyer* v. *Wells, Fargo, & Co.,* 223 U. S. 298 (1912). The difference was that the Oklahoma tax was in addition to general property taxes, while the Minnesota gross receipts tax was a complete substitute for any and all *ad valorem* levies.

In *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450 (1918) the Court was once again called upon to discuss the principles of "in lieu" taxation. The Court said:

> "• • • A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218, and United States Exp. Co. v.

Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax', and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state."

The State also argues that the tax here in question is justifiable for the reason that the valuable terminal facilities of the Appellant are located within the State of New Jersey. He cites in support of that contention cases such as *Fargo* v. *Hart*, 193 U. S. 490 (1904) and *Wallace* v. *Hines*, 253 U. S. 66 (1920). Those cases establish the principle that the mileage of a railroad in any one state may not be valued on a uniform basis with the portions in other states when the portions in those other states are evidently more valuable and have a greater income producing power; or where the value sought to be distributed uniformly over the line has no connection whatsoever with railroad operations. Those authorities are beside the mark in the case at bar for the reason that the exchange value of the Jersey City terminal and yard properties has no relation whatsoever to the question of whether or not the operations of the Appellant within the State of New Jersey are profitable. It is undoubtedly true that the Jersey City properties have a great exchange value. They could be sold for industrial uses, and, as we have shown above, they are already assessed and taxed at their full exchange value. But the State, in asserting that these facilities justify the imposition of the present franchise tax, is confusing the two senses of the word "value". This word may mean exchange value—*i. e.*, the worth of property to those who can put it to its highest or best use, or it may mean capitalized value—*i. e.*, the worth of property as measured by its income-producing power in its present uses. The State adduced no evidence to show that the Jersey City terminals as now used have a high income-producing value. In fact all of the evidence in the record is to the contrary. The I. C. C. Form A reports show that the use of the said terminals in the operation of the CNJ is extremely unprofitable. The record establishes that a substantial portion of the income of CRP is derived from

operations with which the CNJ has no connection whatsoever—operations such as the handling of freight shipments coming from the west and south and terminating at points in Pennsylvania, or the forwarding of freight in direct interchange with such lines as the Delaware & Hudson, the Lehigh & Hudson, the Pennsylvania and others (Exs. S-7, 8, 9 and 10). In fact, only 15% of CRP's train crews are employed in joint through service with CNJ (Ap. 163a-10 to 40). The record also shows that if the CRP were not affiliated with CNJ, and were to use other roads as preferred interchange carriers, then CRP would earn almost as much money as it actually does today (Ap. 129a-30 to 131a-30; Ex. CR-33). These facts being so, the State's reference to the value of the terminal properties is irrelevant. The New Jersey railroad franchise tax does not purport to be based upon the value of property. It purports to be based upon the actual income from operations. The record shows that the operations of CNJ in New Jersey are unprofitable. There is nothing which can change this fact. There is nothing which the State can say to justify the imposition of a tax upon income earned outside of the State.

POINT IV

The New Jersey Railroad Tax Law as Construed and Applied below Denies to Appellant Equal Protection of the Law.

The State's brief attempts to answer Appellant's charge of violation of the Equal Protection clause by asserting that the present case contains no evidence of an intentional or systematic discrimination. Evidence of such discrimination is abundantly present; and in fact some

of it may be found in the very papers filed in this Court by the Attorney General himself.

The State's motion says that the other railroads described in the Jurisdictional Statement as being similarly situated to the Appellant were accorded different tax treatment for the reason that, in their sworn reports they did not treat their subsidiaries as being part of their respective systems. Thus "Pennsylvania Railroad Company did not include in its sworn return the operating accounts of Long Island". If the taxing authorities honestly treat the sworn return of the taxpaying railroad as the basis for exclusion from system tax treatment, then the State's own brief gives evidence of systematic discrimination. The Appellant filed the same sworn return as did the Pennsylvania; the Appellant similarly did not include in its return the accounts of its subsidiary; yet the Appellant was taxed on the basis of its subsidiary's income while the Pennsylvania was not.

The State also attempts to evade the issue of discrimination by suggesting that if mistakes in assessment have been made there is a state-law remedy available for their correction. This suggestion however is wide of the mark, for the State's brief has made no plausible effort to explain why, in each and every case, as well where the subsidiary is excluded from the parent's system as where it is included, the result is favorable to the tax collector and never to the taxpayer. This remarkable coincidence, standing alone, should be enough to show that the inequality of treatment complained of is systematic and deliberate.

And this evidence is reinforced and fortified by the failure of the State to explain away the similarity between the case of the Appellant and the other cases described in which the parent and the subsidiary were not treated as a single system for tax purposes. The

Appellant has given facts concerning the Pennsylvania-Long Island, the B. & O.-Reading and the Pennsylvania-Penn-Reading Seashore connections. Those facts show that these situations are identical in principle with the one at bar. In reply the Attorney General does not even attempt the marshaling of evidence to refute the Appellant's claim. He merely brushes the whole question aside with the general statement that in the other cases the subsidiaries are "separately operated". What facts show that they are separately operated? What differences are there in the operating set-ups? What differences are there in the accounting procedures? What differences are there in the manner of transportation service provided? If there were any material difference between the present case and the other cases described by the Appellant, the State certainly ought to be able to give some lucid and detailed explanation of the difference in tax treatment.

In attempting to distinguish the present case from the other examples given by Appellant, the State's brief says that in the other cases the parent acquired control of a subsidiary which already owned its own property whereas here the parent not only created the subsidiary but also gave it its property. Such an attempted distinction is futile. First, because it is immaterial. The Attorney General has always insisted, and the Supreme Court of New Jersey has held, that the criterion for differences in tax treatment under the law of New Jersey is the difference in the manner in which the taxable property is used. If this is so, it is immaterial how it was *acquired*. A parent railroad may have the same operating relationships with its subsidiary whether it acquired the subsidiary full-blown or whether it created it.

If, however, the manner of acquisition were important, the State then fails to explain the difference between the Appellant and the Penn-Reading Seashore Lines.

As we have shown in the Jurisdictional Statement Penn-Reading was created by an agreement between its parent companies, and acquired all of its property from them. Yet, the Penn-Reading is taxed as a separate entity and not as part of the Pennsylvania Railroad system.

The State is unable to show why the other carriers similarly situated to the Appellant were given different tax treatment, because the only plausible explanation is that there was intentional discrimination. Where the subsidiary operates at a profit it is included in the "system". Where the subsidiary operates at a deficit it is excluded.

The tax, however, purports to be levied upon the franchise—that is to say, upon the privilege of carrying on the business of railroading within the state. In this very case the Supreme Court of New Jersey has judicially declared that the criterion for discrimination among taxpayers is the manner in which property is used. Effectually, however, the present decision would add another requirement—namely, that the property must have been acquired in a certain way. Thus, A and B might utilize their properties in exactly the same manner and for exactly the same purposes. Yet A would be taxed and B would go free, simply and solely because of a difference in the manner in which each acquired his property. Such a principle of classification is completely irrational and arbitrary, and the Appellant is protected against it by the Equal Protection clause.

Up to this point we have assumed, along with the State, that it is necessary for the Appellant to show actual and intentional discrimination in order to prevail. Actually, that assumption is entirely unfounded. In the present case the Appellant is not attacking one specific act of state officials as being discriminatory. Appellant is attacking a *construction* of a state statute which results

in arbitrary and irrational classification among similarly situated taxpayers. In such cases the irrationality alone need be shown and the Court is unconcerned with the intention or motive of the state agencies which so construe the law. *E. g., Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Stewart Dry Goods Co.* v. *Lewis, supra; Hartford Steam Boiler Ins. Co.* v. *Harrison*, 301 U. S. 459 (1937).

Conclusion

For the foregoing reasons and as well for the reasons set forth in the Jurisdictional Statement, Appellant respectfully urges that the motion of the State of New Jersey to dismiss or affirm be denied.

Respectfully submitted,

James D. Carpenter,
Attorney for and of Counsel with Appellant,
75 Mortgomery Street,
Jersey City 2, N. J.

Judson C. McLester, Jr.,
Elmer J. Bennett,
Milton A. Dauber,
On the Brief.

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Office - Supreme Court, U. S.
FILED
JAN 23 1952
CHARLES ELMORE CROPLEY

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

THEODORE D. PARSONS
ATTORNEY GENERAL

DIVISION OF LAW
STATE HOUSE
TRENTON 7

January 16, 1952

Honorable Charles Elmore Cropley
Clerk, Supreme Court of the United States
Washington 13, D. C.

Re: The Central Railroad Co. of New Jersey, Appellant,
v.
Division of Tax Appeals, et al., Appellees.
No. 520

Dear Mr. Cropley:

The State of New Jersey has just been served with copies of brief of the appellant opposing the motion to dismiss or affirm in the above entitled matter. The brief states at page 9:

> "For one thing, the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N.J.S.A. Supp. 54:29A-13."

This is not a correct statement.

The "Railroad Tax Law of 1941" was amended in 1948, the law as amended becoming the "Railroad Tax Law of 1948". Section 17 thereof (P.L. 1948, ch. 40, p. 123; N.J.S.A. 54:29A-74.1) provides in part as follows:

> "The taxes imposed by this act shall be in lieu of all other State and local taxation of or upon franchise and property used for railroad purposes. * * *"

The State of New Jersey realizes that there must be an end to the argument permitted in such matters, particularly on motion such as in the instant case. Nevertheless, the State

does not feel that such a complete disregard of the pertinent statutory provisions should be permitted to go unchallenged. It is therefore respectfully requested that, if possible, the above information be presented to the Supreme Court as an addendum to the statement of the State making against jurisdiction or, if this may not be done, such information may be brought to the attention of the Court in some other appropriate manner.

A copy of this letter is being sent to James D. Carpenter, Esq., Attorney for and of Counsel with Appellant.

Yours very truly,

Theodore D. Parsons
Attorney General

By Benjamin C. Van Fine
Benjamin C. Van Fine
Deputy Attorney General
Of Counsel with Appellee,
State of New Jersey.

COPY

CARPENTER, GILMOUR & DWYER
75 MONTGOMERY STREET - JERSEY CITY 2, N. J.

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Office - Supreme Court, U. S.
FILED
JAN 23 1952
CHARLES ELMORE CROPLEY
CLERK

January 18, 1952

Hon. Charles Elmore Cropley, Clerk,
Supreme Court of the United States,
Washington 13, D. C.

Re: The Central Railroad Co. of New Jersey, Appellant vs.
Division of Tax Appeals, et al., Appellees,
No. 520

Dear Mr. Cropley:

I have just received a copy of a letter addressed to you in the above entitled matter by the Attorney General of the State of New Jersey under date of January 16, 1952, in which he states that the following statement, appearing at Page 9 of our brief opposing the motion to dismiss or affirm, is not correct:

> "For one thing , the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N.J.S.A. Supp. 54:29A-13."

The Attorney General bases his statement on the following provision, which he quotes from Section 17 of the "Railroad Tax Law of 1948":

> "The taxes imposed by this act shall be in lieu of all other State and local taxation of or upon franchise and property used for railroad purposes. * * * "

I was fully aware of the provision which the Attorney General has quoted from Section 17 of the "Railroad Tax Law of 1948" when I filed my said brief, and I have reexamined it since receiving the Attorney General's letter, and I remain of the opinion that there is no provision in the "Railroad Tax Law of 1948" to the effect that the franchise tax imposed on railroads by Section 13 of that law is in lieu of all other taxes on the franchise.

PAGE BOUND VERTICAL IN BOOK

CARPENTER, GILMOUR & DWYER
75 MONTGOMERY STREET - JERSEY CITY 2, N. J.

 January 18, 1952

If the Attorney General's letter should be brought to the attention of the Supreme Court in any manner, I request that this letter also be brought to the Court's attention.

A copy of this letter is being sent to Benjamin C. Van Tine, Deputy Attorney General of the State of New Jersey, attorney for and of counsel with appellees.

Respectfully yours,

James D. Carpenter

JAMES D. CARPENTER

JDC:dff

Office - Supreme Court, U.
FILED
MAR 18 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Petitioner-Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY,
Defendant-Respondent.

On Appeal from the Supreme Court of New Jersey

PETITION FOR REHEARING

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, petitioner-appellant, prays that this Court grant rehearing of its order of March 3, 1952, dismissing the appeal for want of a substantial Federal question, and that the Court note jurisdiction in the above entitled case, as prayed for in the Petition of Appeal filed herein on December 18, 1951 and the moving papers thereon.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

POINT I

The order of dismissal in No. 520 is in conflict with *Standard Oil Co.* v. *Peck*, No. 184, 20 U. S. L. W. 4113 (Feb. 4, 1952).

The order of the Court dismissing the appeal in No. 520 is startling in view of the Court's action one month earlier in declaring invalid the Ohio tax upon boats and barges in *Standard Oil* v. *Peck*. This Court held that the boats could not be taxed at their full value for the reason that the evidence established that the boats spend most of their time outside of Ohio. We quote the following from the opinion itself:

> "* * * there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations."

That case is identical in principle with No. 520. The evidence clearly shows that The Central Railroad Company of New Jersey earns no net railway operating income within the State of New Jersey while its subsidiary, The Central Railroad Company of Pennsylvania, earns income from activities carried on wholly within Pennsylvania. This is shown by minute and detailed operating records kept by the appellant and its subsidiary, in conformity with the practices established by the Interstate Commerce Commission. The accuracy and honesty of these records in fairly apportioning income to the state in which it is actually earned is eloquently established by the fact that the *gross* operating income of the two roads is divided by the operating accounts in the same

proportions which the State of New Jersey claims should be applied to the net. At the same time, an analysis of the operating expenditures of the two roads shows that the deficit attributable to New Jersey results entirely from costs and taxes which are entirely local and which could not, under any rational system, be chargeable against operations carried on in Pennsylvania. As was pointed out in Appellant's brief, the State of Pennsylvania would have a perfect right to tax the entire net railway operating income of the CRP. Under the decision of this Court, the State of New Jersey is also permitted to tax 67% of that net railway operating income. The effect of the decision of this Court in No. 520 is to permit "multiple taxation of interstate operations", and a tax which has "no relation to the opportunities, benefits or protection which the taxing state gives those operations."

POINT II

The dismissal of the appeal in No. 520 is all the more startling because it clearly overrules, *sub silentio*, earlier and well established decisions of this Court.

We refer to *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76 (1926), and *Norfolk & Western Railway Co.* v. *North Carolina*, 297 U. S. 682 (1935), where this Court held that a state franchise tax on an interstate railroad measured by its net railway operating income allocated to the taxing state on the basis of a mileage formula is invalid where the formula, while not arbitrary on its face or in its general operation, is unworkable or unfair when applied to a particular railway in particular conditions.

That we have in this case just such a situation is demonstrable beyond any doubt. The separate operating accounts maintained by the appellant with respect to its

operations in New Jersey, pursuant to Interstate Commerce Commission standards, show that in each of the tax years in question there was a loss running to millions of dollars on the operations in New Jersey, and that absolutely every penny of the operating income of the so-called "system" arose from the operation in Pennsylvania. This is precisely the sort of unfairness this Court adverted to in the *Southern Railway* case and in the *Norfolk & Western Railway* case as invalidating such state taxation as applied to a particular railway in particular conditions.

We cannot see any significant factual difference between this case and the *Southern Railway* case and the *Norfolk & Western Railway* case, and we do not believe it was the intention of the majority of the Court in this case to overrule, *sub silentio*, these important and well-known cases by their vote to dismiss this appeal.

POINT III

The order of dismissal in No. 520 suggests that this Court applied to the case the principles governing petitions for certiorari rather than the principles governing appeals as of right.

The present appeal was evidently dismissed under the provision of Rule 12 which requires that the appellant present a substantial Federal question. In the case of failure to present a substantial question, the decisions of this Court indicate that the dismissal may legitimately be based upon one of two considerations. The first is that the questions presented are so explicitly foreclosed by prior adjudications as to be capable of determination without extended argument. That criterion could obviously not have been the basis for this decision since it would be totally inapplicable. Appellant does not come here upon a purely legal proposition. Rather, appellant comes here

insisting that certain well-settled principles concerning the power of a state to tax extra-state activities be applied to the particular facts here presented. As this Court itself has said in *Freeman* v. *Hewit*, 329 U. S. 249, at 252 (1946):

> "* * * especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

The second basis for dismissing an appeal as insubstantial is that the "asserted right is so wanting in foundation and insubstantial as to be devoid of all merit and frivolous." *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668, at 671 (1915). And see *Wabash R. R. Co.* v. *Flannagan*, 192 U. S. 29, at 38 (1904). Appellant has reexamined the record in the light of this principle and is honestly unable to conclude that the Federal right set up is frivolous. On the contrary, the evidential facts, which have been detailed in Point I, make a very strong case. Perhaps the short answer to the charge of frivolity is that one-third of the membership of this Court have voted for the acceptance of jurisdiction.

Appellant is, therefore, reluctantly led to the conclusion that the appeal has been dismissed because the majority of the Court are of the opinion that the case is important only to these litigants and does not present an appropriate opportunity for the enunciation of general principles capable of settling the course of future litigation between other parties. In other words, appellant concludes that this Court, in violation of the statutory mandate and in violation of its own rules, has treated the present Appeal as though it were a Petition for Certiorari.

The Court is, of course, aware that in the minds of some students of its work there exists the suspicion that for every practical purpose the two procedures have been merged and that this Court consistently disposes of appeal cases more in the light of their capacity as vehicles for

enunciating general principles and laying general controversies to rest than in the light of the meritorious rights of the parties involved. See, *e. g.*, Ulman and Spears, *Dismissed for Want of a Substantial Federal Question*, 20 B. U. L. Rev. 501, 529 (1940); Note, *The Insubstantial Federal Question*, 62 Harv. L. Rev. 488 (1949). It is quite obvious that there is no explicit sanction for such a policy in either the Judicial Code or the Rules of this Court. What is more, the history of the Judiciary Act of 1925, which delineated the jurisdiction of this Court in substantially its present form, affirmatively shows that this intermingling of the purposes of Appellate and Certiorari jurisdiction was not intended to occur.

It is matter of common knowledge that Chief Justice Taft heartily desired the abolition of the mandatory jurisdiction, it being his thought that the discretionary jurisdiction ought to extend to all cases arising in state courts. It was his position that the Court ought to relinquish its function as the vindicator of federal rights as such, but should stand merely as the guardian of the Constitution—so to speak, as a third house of the legislature. It is worthy of note that, notwithstanding the great prestige of the Chief Justice, no such provision was included even in the so-called "Judges Bill" upon which the 1925 Act was based. For the history of the Act of 1925 see Frankfurter and Landis, *Business of the Supreme Court*, Chapter 7 (1928).

That the policy of treating mandatory appeals as though they were petitions for Certiorari has been instituted without Congressional authority raises a very serious danger to the position of the Court. So long as this Court is by statute required to sit as the arbiter of purely private rights, so long as the statute tells the nation that it may look to this Court for the protection of federal rights when they are trampled by a state statute, the standing of this Court requires that that duty be

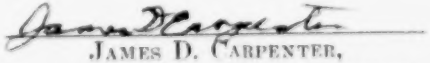
fully discharged. The original purpose of the mandatory jurisdiction in appeals from state courts was to prevent the discontents arising from the danger that state courts would be more jealous of local rights than of federal claims. That danger was real in 1789; and, as is shown by the decisions of this Court in *Standard Oil Co.* v. *Peck*, *supra*, and *Memphis Steam Laundry* v. *Stone*, 20 U. S. L. W. 4162, that danger is real in the month of March, 1952. To a very great extent, the enjoyment of rights granted by the Constitution of the United States, and the widespread national adherence to that Constitution, depend upon the power and willingness of this Court to speak out whenever an appellant comes before it with evidence of a probable infringement of his rights. It is not enough to speak out merely on questions which are interesting, or on questions which are unsettled, or on questions which the Court believes to represent a pattern in litigation. The statute requires that this Court will exercise its mandatory jurisdiction to protect federal rights *whenever* they are violated by a statute of a state.

CONCLUSION

For all of the foregoing reasons appellant respectfully urges that this Court recall its mandate in No. 520, and that the case be restored to the docket to the end that it may be fully heard and determined.

Dated: March 17, 1952.

Respectfully submitted,



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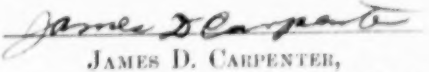
CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.



JAMES D. CARPENTER,
Counsel for Petitioner-Appellant.

No. 520. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* DIRECTOR, DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. THE CHIEF JUSTICE, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted. *James D. Carpenter* and *Judson C. McLester, Jr.* for appellant. *Theodore D. Parsons*, Attorney General of New Jersey, and *Bejamin C. Van Tine*, Deputy Attorney General, for appellee. Reported below: 8 N. J. 15, 83 A. 2d 527.